Supreme Court, U.S.
FILED

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No. 02-

IN THE
Supreme Court of the United States

CITY OF WHITE PLAINS,

Petitioner,

v.

TCG NEW YORK, INC., TC SYSTEMS, INC.,
and TELEPORT COMMUNICATIONS dba TCNY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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147 pp

QUESTIONS PRESENTED

Where the City, in its regulatory and proprietary capacities, adopted an ordinance that: (i) established procedures by which telephone companies should obtain permission to use the public rights-of-way; (ii) provided for the payment of compensation to the City for that use; and (iii) established conditions regulating such use –

1. Whether the court of appeals properly preempted provisions of the City's ordinance based on an unfair competition standard instead of the "prohibitory" test prescribed in Section 253(a) of the Communications Act?

2. Whether federal courts, having found a local government's franchising ordinance to be prohibitory "as a whole," can preempt under Section 253(a) severable provisions found to fall outside the management and compensation "carve-out" from that subsection effected by subsection (c), without finding the individual provisions to be themselves prohibitory?

3. Whether, under Section 253(c), which excludes from federal preemption under subsection (a) compensation that is "competitively neutral and nondiscriminatory," the City must impose the identical rate of compensation going forward on all telephone companies, including even the incumbent telephone company which had previously entered the rights-of-way under non-comparable circumstances?

4. Whether the courts below, relying on what was effectively a strict scrutiny test, properly preempted in advance of application the Common Council's legislative adoption of a "public interest"

standard to govern franchising of the City's rights-of-way?

5. Whether the federal courts may preempt the City's legislative decision to vest in the Common Council final discretion to consent to the use of the City's rights-of-way by specific telecommunications providers?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings below were the City of White Plains, defendant and petitioner here, and TCG New York, Inc., TC Systems, Inc., and Teleport Communications dba TCNY, co-plaintiffs and respondents here.

The petitioner is a municipal corporation.

The opinion in the District Court recites that the plaintiffs-respondents are wholly owned subsidiaries of AT&T Corp., a publicly traded company. (Pet. App. at 27a)

Briefs amici were filed below by WorldCom, Inc., City of New York, the New York State Conference of Mayors and Municipal Officials, and jointly the International Municipal Lawyers Association, the Town of Colonie, N.Y., the National Association of Telecommunications Officers and Advisors, the U.S. Conference of Mayors, and the National League of Cities. A brief amici and a supplemental brief amici were filed jointly by the Federal Communications Commission and the United States.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 2

NOTIFICATIONS PURSUANT TO RULE 29(B) AND (C) 2

STATUTES, RULES, AND ORDINANCES INVOLVED 2

STATEMENT OF THE CASE 5

The Competitive Regulatory Model of the 1996 Act 5

The City's Ordinance Was a Prudent Response to the New Environment. 8

The Course of the Proceedings Below. 10

There Is Great Confusion in the Lower Courts About How Section 253 Should Be Interpreted, and Only this Court Can Provide National Uniformity. 14

REASONS FOR GRANTING THE PETITION 17

I. The Structure of Section 253 Has Led to Great Confusion Among the Lower Courts, Which in this Case Led the Court of Appeals To Contravene the Decision of Congress To Preserve the City's Authority Over Public Rights-of-Way Management and Compensation. 17

A. "Unfair Competition" Is Not a Proper Ground for Preemption under Section 253(a)'s "Prohibitory" Test. 17

B. Section 253(a) Does Not Authorize Preemption of Severable Provisions that Are Themselves Not Prohibitory. 20

II. In Holding that Section 253(c) Requires the City to Charge the Same Franchise Fees to Non-comparably Situated Carriers on a Going-Forward Basis, the Decision of the Court of Appeals Conflicts Directly with the Intent of Congress and a Decision of Another Circuit 23

III. The Courts' Facial Preemption of the Ordinance Provisions Allowing the City To Consider the Public Interest was Unnecessary, Premature, and in Conflict with Relevant Decisions of this Court. 27

IV. The Preemption of Provisions Reserving Discretion To Approve a Transfer or Initial Grant of a Franchise Conflicts with Relevant Decisions of This Court, Because It Relies on an Interpretation of Section 253 That Needlessly Raises Constitutional Questions. 29

CONCLUSION 31

Appendices:

A -- Opinions Below:

Second Circuit (Sept.12, 2002) 1a

S.D.N.Y. (Jan. 31, 2001) 27a

B -- City of White Plains Telecommunications Franchising and Licensing Ordinance, adopted Dec. 1, 1997 ..... 1b

C -- Post-argument Questions Addressed by the Second Circuit to the FCC (January 29, 2002) 1c

D – Excerpts from the City's August 1999 proposed franchise agreement 1d

E – Letter of Jeffrey D. Atkins dated December 2, 2002 granting extension of time to file petition for certiorari 1e

TABLE OF AUTHORITIES

FEDERAL CASES

AT&T Corp. v. Iowa Utils. Bd.,
525 U.S. 366 (1999) 6, 15, 20

Board of Governors v. Dimension Fin. Corp.,
474 U.S. 361 (1986) 19

Bell Atlantic-Maryland, Inc. v. Prince Georges County, 212 F.3d 863 (4th Cir. 2000) 14

BellSouth Telecomms., Inc. v. Town of Palm Beach, 252 F.3d 1169 (11th Cir. 2001). 14, 15

Brockett v. Spokane Arcades, Inc.,
472 U.S. 491 (1985) 22

Building and Constr. Trades Council v. Associated Builders and Contractors of Massachusetts/ Rhode Island, Inc., 507 U.S. 218 (1993) 22

Cablevision of Boston, Inc. v. Public Improvement Comm'n, 184 F.3d 88
(1st Cir. 1999) 7, 14, 15, 18, 30

Cities of Dallas and Laredo v. FCC,
118 F.3d 393 (5th Cir. 1997) 10

City of Abilene v. FCC, 164 F.3d 49
(D.C. Cir. 1999) 15, 31

City of Auburn v. Qwest Corp., 260 F.3d 1160
(9th Cir. 2001), *cert. denied*,
122 S. Ct. 809 (2002) 14

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) 29

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council, 485 U.S. 568 (1988) 29

FCC v. RCA Communications, 346 U.S. 86 (1953) 5

FERC v. Mississippi, 456 U.S. 742 (1982) 7

Gregory v. Ashcroft, 501 U.S. 452 (1991) 15, 29

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 31

Louisiana PSC v. US and FCC, 476 U.S. 355 (1986) 21

Maryland v. U.S., 460 U.S. 1001 (1983) 5

McGowan v. Maryland, 366 U.S. 420 (1961) 28

Missouri Municipal League v. FCC, 299 F.3d 949 (8th Cir. 2002) 14, 15

NCTA v. Gulf Power Co., 534 U.S. 327 (2002) 6

National Broadcasting Co. v. United States, 319 U.S. 190 (1943) 28

New Jersey Payphone Ass'n, Inc. v. Town of West New York, 299 F.3d 235 (3d. Cir. 2002) 14, 15, 17

New York Securities Corp. v. U.S.,
287 U.S. 12 (1932) 28

People of the State of New York v. Van De Carr,
199 U.S. 552 (1905) 28

Printz v. United States, 521 U.S. 898 (1997) 30

Rodriguez v. United States, 480 U.S. 522 (1987) 19

TCG Detroit v. City of Dearborn, 206 F.3d 618
(6th Cir. 2000) 14, 18, 23, 30

TCG New York, Inc. v. City of White Plains,
305 F.3d 67 (2d Cir. 2002) 1, 14

TCG New York, Inc. v. City of White Plains,
125 F. Supp. 2d 81 (2000) 1

Texas & P. Ry. v. Abilene Cotton Oil Co.,
204 U.S. 426 (1907) 16

U.S. v. 50 Acres of Land, 469 U.S. 24 (1984) 8

United States v. Salerno, 481 U.S. 739 (1987) 29

Verizon Maryland, Inc. v. Pub. Serv. Comm'n
of Maryland, 535 U.S. 635 (2002) 6

Warth v. Seldin, 422 U.S. 490 (1975). 7

DOCKETED CASES

Qwest Corp. v. City of Santa Fe, 224 F. Supp. 2d 1305 (D. N.M. 2002), *appeal docketed*, No. 02-2258 (Sept. 27, 2002) 14

Qwest Corp. v. City of Portland, 200 F. Supp. 2d 1250 (D. Or. 2002), *appeal docketed*, No. 02-35475 (9th Cir. May 14, 2002) 14

ADMINISTRATIVE DECISIONS

In re California Payphone Ass'n, Memorandum Opinion and Order, 12 FCC Rcd. 14,191 (1997).. 19

In re MCI Telecomms. Corp., Case 98-C-0799, 1998 WL 1031962 (N.Y.P.S.C. Dec. 7, 1998) 25

FEDERAL STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 2

28 U.S.C. § 1337 2

28 U.S.C. § 2403(a) 2

28 U.S.C. § 2403(b) 2

47 U.S.C. § 151 ..... 6, 24

47 U.S.C. § 152 nt. 4, 7

47 U.S.C. § 152(b) 21

47 U.S.C. § 154(i) 6

47 U.S.C. § 251(d)(2) 19

47 U.S.C. § 252(e)(2)(A) 28

47 U.S.C. § 253 ..... passim

47 U.S.C. § 253(a) ..... passim

47 U.S.C. § 253(b) 2, 6

47 U.S.C. § 253(c) ..... passim

47 U.S.C. § 253(d) 2, 6, 15

47 U.S.C. § 254 24

47 U.S.C. § 303 28

47 U.S.C. § 332(c)(7) 7

47 U.S.C. § 542(b) 10

U.S. Const. art. I, § 9 4

U.S. Const. art. IV, § 4 ..... 4, 30

U.S. Const. amend. V 4

– STATE STATUTES

City of White Plains Charter, § 33, 1915 N.Y. Laws Ch. 356 ..... 5, 10

N.Y. General City Law § 20(7) (Consol. 2001) 8

N.Y. General City Law § 20(10) (Consol. 2001) 5

N.Y. Municipal Home Rule Law §§ 10(6), (11) and (12) (Consol. 2001). 5, 8

N.Y. Statute of Local Gov't Law § 10(5) (Consol. 2001) 5, 8

N.Y. Transp. Corp. Law § 27 (Consol. 2001) 5

LEGISLATIVE MATERIALS

141 Cong. Rec. H8460 (daily ed. Aug. 4, 1995) 8, 19, 26

141 Cong. Rec. H8461 (daily ed. Aug. 4, 1995) 8

141 Cong. Rec. S8173 (daily ed. June 12, 1995) 7, 8

RULES AND REGULATIONS

Sup. Ct. R. 14.1(f) 2

Sup. Ct. R. 29(4)(c) 2

MISCELLANEOUS

17 Wright & Miller, Federal Practice and Procedure § 4037 n.59 (2d ed. 1988) 2

Gardner F. Gillespie, *Rights-of-Way Redux: Municipal Fees on Telecommunications Companies and Cable Operators*, 107 Dick. L. Rev. 209 (2002) 14

In the
SUPREME COURT OF THE UNITED STATES

CITY OF WHITE PLAINS,

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v.

TCG NEW YORK, INC., TC SYSTEMS, INC., AND TELEPORT COMMUNICATIONS dba TCNY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, the City of White Plains, New York ("White Plains" or the "City"), respectfully prays that a writ of certiorari issue from this Court to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered on September 12, 2002, in this case.

OPINIONS BELOW

The decision of the U.S. District Court for the Southern District of New York (Pet. App. 27a-66a) is reported at 125 F.Supp.2d 81 (2000). The decision of the U.S. Court of Appeals for the Second Circuit (Pet. App. 1a-26a), filed September 12, 2002, is reported at 305 F.3d 67. The opinion was modified on September 20, 2002.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Second Circuit was entered on September 12, 2002, and the accompanying opinion was corrected by order of the clerk on September 20, 2002. The jurisdiction of this Court to review the judgment and opinion below is invoked under 28 U.S.C. § 1254(1). The District Court had jurisdiction over respondents' complaint under 28 U.S.C. §§ 1331 and 1337. By letter dated December 2, 2002, Justice Ginsburg extended the City's time for filing this petition to January 10, 2003 (Pet. App. 1e-2e).

NOTIFICATIONS PURSUANT TO RULE 29(B) AND (C)

While the Federal Communications Commission ("FCC") and the United States jointly filed a brief amici in the court of appeals on June 12, 2001, and filed a supplemental brief on March 11, 2002, neither is a party, and the Solicitor General has been notified pursuant to 28 U.S.C. § 2403(a) under Rule 29(4)(c). It does not appear that the Attorney General of the State of New York was notified below that the constitutionality of a statute of the State within the meaning of Section 2403(b)[1] has been called into question; this has now been done by means of service of this petition.

STATUTES, RULES, AND ORDINANCES INVOLVED

The following statutory and constitutional provisions are set forth verbatim in the text, pursuant to Rule 14.1(f). This case involves the application of, and constitutionality of, Section 253(a)-(d), 47 U.S.C. § 253(a)-(d) ("Section 253"), which was added to the

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[1] *See* 17 Wright & Miller, Federal Practice and Procedure, § 4037 n.59 (2d ed. 1988) (local ordinance qualifies as state statute for appeal under 28 U.S.C. § 1254[2]) (1988).

Communications Act of 1934 (the "Communications Act") by Section 101(a) of the Telecommunications Act of 1996 (the "1996 Act"), 110 Stat. 56, 70:

> Sec. 253. REMOVAL OF BARRIERS TO ENTRY.
>
> (a) IN GENERAL. – No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) STATE REGULATORY AUTHORITY. – Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> (c) STATE AND LOCAL GOVERNMENT AUTHORITY. – Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminately basis, if the compensation required is publicly disclosed by such government.
>
> (d) PREEMPTION. – If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that

> violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

Also involved is Section 601(c)(1) of the 1996 Act, 110 Stat. 56, 143, 47 U.S.C. § 152 nt, which reads as follows:

> Sec. 601. APPLICABILITY OF CONSENT DECREES AND OTHER LAW.
>
> * * *
>
> (c) FEDERAL, STATE, AND LOCAL LAW. –
>
> (1) NO IMPLIED EFFECT. – This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.
>
> * * *

This case also involves three provisions of the United States Constitution. The Commerce Clause, U.S. CONST. art. I, § 9, states:

> The Congress shall have Power . . . To regulate Commerce . . . among the several states . . . .

The Guaranty Clause, U.S. CONST. art. IV, § 4, states:

> The United States shall guarantee to every State in this Union a Republican Form of Government . . . .

The Takings Clause, U.S. CONST. amend. V, states:

> [N]or shall private property be taken for public use, without just compensation.

The decisions below pre-empted in part the City's 1997 Telecommunications Franchising and Licensing ordinance (the "Ordinance"), which appears in the statutory appendix to this petition (Pet. App. 1b).

STATEMENT OF THE CASE

This case arose out of the efforts of White Plains to respond to new burdens created by the adoption of the 1996 Act. In 1997, White Plains enacted the Ordinance in order to satisfy the City's rights-of-way management responsibilities in the new world of competitive telecommunications providers envisioned by Congress, and to comply with new statutory standards imposed by Section 253. The plaintiffs below, which are subsidiaries of AT&T Corp., challenged the City's authority to adopt and enforce the Ordinance, asserting that the Ordinance violated Section 253. New York law authorizes White Plains to control the use of its rights-of-way by telecommunications providers.[2]

The Competitive Regulatory Model of the 1996 Act. The 1996 Act amended the Communications Act to foster competition in the provision of telecommunications and cable television services. *See* title of the 1996 Act, 110 Stat. 56. Common carrier services had traditionally been regulated as *de facto* monopolies. *See FCC v. RCA Communications*, 346 U.S. 86, 92 (1953) ("Three Circuits" case); *but cf. Maryland v. U.S.*, 460 U.S. 1001, 1002 (1983) (AT&T divestiture). The 1996 amendments to Title II (Common Carriers) of the Communications Act were intended to convert regulation of the telecommunications industry from a model based on the traditional presumption

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[2] *See, e.g.*, City of White Plains Charter, § 33, 1915 N.Y. Laws Ch. 356 ("City Charter"); N.Y. Transp. Corp. Law § 27 (Consol. 2001); N.Y. Gen. City Law § 20(10) (Consol. 2001); N.Y. Stat. of Local Gov't Law § 10(5) (Consol. 2001); N.Y. Mun. Home Rule Law §§ 10(6), (11) and (12) (Consol. 2001).

that telecommunications providers were monopolies, to a model based on the presumption that competition was possible and to be encouraged. Pet. App. at 37a; ("pro-competitive goals"), Pet. App. at 20a. This Court has had occasion to consider the application of certain aspects of the new competitive regulatory model to regulation of the providers of telecommunications services. *See, e.g., Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland,* 535 U.S. 635 (2002) (§§ 251-52); *NCTA v. Gulf Power Co.,* 534 U.S. 327 (2002) (§ 224); *AT&T Corp. v. Iowa Utils. Bd.,* 525 U.S. 366 (1999) (§§ 2[b], 251-52). The Court has not, however, addressed any of the issues presented by this case.

Congress added Section 253 to the Communications Act as part of the 1996 Act's regulatory overhaul. Section 253(a) was designed to effect the 1996 Act's generally pro-competitive purpose by preempting any remnants of monopoly-based regulation by the states and local governments. Congress, however, expressly limited the preemptive scope of Section 253(a) and preserved state and local authority, in several ways. Section 253(b) excluded from preemption the role of state regulation under the 1996 Act in effecting universal service, public safety and welfare, service quality, and consumer rights. Section 253(c) of the 1996 Act similarly excluded from preemption the ability of local governments "to manage the public rights-of-way" and "to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and non-discriminatory basis" for providers' "use" of the public rights-of-way. And in Section 253(d), Congress carved out from the FCC's implied jurisdiction under Sections 1 and 4(i) of the Communications Act, 47 U.S.C. §§ 151, 154(i), "to execute and enforce the provisions" of the Communications Act, any jurisdiction to issue preemptive

orders with respect to local activities within subsection (c), leaving jurisdiction of those matters to the courts.[3]

In addition, Congress further limited any preemptive effect of the 1996 Act to express preemption, by negating implied preemption in Section 601(c)(1) of the 1996 Act.

In other words, Congress very carefully and specifically left in the hands of local governments the responsibility for managing multiple uses – telecommunications and non-telecommunications – in their public rights-of-way.. The 1996 Act did not attempt to commandeer local governments to affirmatively advance competition, *Cablevision of Boston, Inc. v. Public Improvement Comm'n*, 184 F.3d 88, 104 (1st Cir. 1999), but local governments now became responsible for accommodating in their rights-of-way not only the lines of the incumbent telephone company, the gas, water, and electric utilities, the cable television and OVS[4] operators, and the sewer authority, but also an increasing and unpredictable number of competitive telephone providers. Section 253(c) of 1996 Act left with local governments the continuing responsibility to coordinate all these special users and to minimize any adverse impact from installation and maintenance of subsurface facilities with surface use by the public users, *viz.*, pedestrians, motor vehicles, and the like. Congress recognized that the Federal government could not do that from Washington. *See* 141

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[3] The same Congressional respect for the role of local governments is reflected in the drafting of Section 332(c)(7), which largely left in place the traditional and preeminent role of local governments in zoning matters and provided for appeals directly to "any court of competent jurisdiction." *See FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) (regulation of land use is "perhaps the quintessential state activity"); *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975) ("zoning laws and their provisions . . . are peculiarly within the province of state and local legislative authorities").

[4] Congress contemplated the creation of a new class of lightly regulated "open video systems." *See* 47 U.S.C. § 573.

Cong. Rec. S8173 (daily ed. June 12, 1995) (statement of Sen. Kempthorne). Local governments retain the prerogative to recover their regulatory costs in the form of user fees.[5] At the same time, Congress recognized the proprietary right of local governments to receive compensation for the use of their property, *i.e.*, the public rights-of-way, by private parties for profit.[6]

The ability to receive compensation for use derives from whatever proprietary powers a local government may have under state law, and Congress did not use language intended to "crowd" the Fifth Amendment by taking away those property rights. *See U.S. v. 50 Acres of Land*, 469 U.S. 24, 31 (1984) (Fifth Amendment protects municipal property just as private property). The 1996 Congress was particularly interested in respecting local and state authority under our federal system. "The Federal Government has absolutely no business telling state and local government how to price access to their local right-of-way." 141 Cong. Rec. H8460 (daily ed. Aug. 4, 1995) (statement of Rep. Barton); *see also* at H8461.

The City's Ordinance Was a Prudent Response to the New Environment. White Plains recognized that the 1996 Act would require changes in how the City managed its rights-of-way. Not only did Section 253 impose federal legal standards for the first time, but the entire premise of the 1996 Act was that numerous new providers would be competing to serve customers in White Plains. Many of these providers – nobody could say how many – would presumably require access to the City's rights-of-way, whereas in the past only Verizon and its predecessors had any significant presence in

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[5] N.Y. Stat. of Local Gov't Law § 10(5) (Consol. 2001).

[6] *Id.*; *see also* N.Y. Gen. City Law §20(7) (Consol. 2001); N.Y. Stat. of Local Gov't. Law § 10(5) (Consol. 2001); N.Y. Mun. Home Rule Law §§ 10(6), (11), (12) (Consol. 2001).

the City's rights-of-way.[7] The activities of these new rights-of-way users would impose new burdens on White Plains, and raised new questions about the policies White Plains should pursue with regard to management of its rights-of-way and seeking compensation for the use of City property by telecommunications providers. For one thing, the new federal law seemed to require a prudent local government to take steps to ensure that providers in comparable circumstances would be treated in comparable fashion.

The 1996 Act did not dictate that White Plains adopt a particular approach for dealing with the new competitive environment. Indeed, because Section 253(c) preserved local authority over management and compensation, White Plains had a range of policy options, so long as it did not prohibit competitors from operating in the City. Accordingly, to facilitate the entry of multiple providers while protecting the City's interests in its property and the safety of the public, the City Council passed the Ordinance (Pet. App. 1b-14b). As authorized by state law,[8] the Ordinance in general terms requires that telecommunications providers apply for municipal permission before emplacing their facilities in, and using them in their private businesses within, the public rights-of-way. The Ordinance requires telecommunications providers to first apply for franchises granting them the general right to use or occupy the City's rights-of-way. Ordinance § 2-1-01 (Pet. App. 5b). The specific terms of a franchise are to be negotiated between the provider and the City. Ordinance § 2-6 (Pet. App. 8b-9b). The subjects to be addressed in a franchise agreement are specified in the Ordinance. Ordinance § 2-9 (Pet. App. 11b-13b). In addition to obtaining a franchise, providers must comply with policies, rules and requirements adopted by the

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[7] Before 1996, in addition to Verizon, only one telecommunications provider was occupying the City's rights-of-way under a franchise.

[8] *See* note 2, *supra*.

City to carry out the purposes of the Ordinance, and must obtain construction permits before installing equipment or doing other work in the rights-of way. Ordinance § 2-2-02 (Pet. App. 7b).

After negotiations with various providers during the period leading up to and following adoption of the Ordinance, White Plains entered into a number of franchise and license agreements under the Ordinance. The franchise agreements provided for, among other things, compensation at the rate of five percent of gross revenues – much like that applicable to cable operators under Section 622(b) of the Cable Act of 1984, as amended, 47 U.S.C. § 542(b). The cable franchise fee constitutes "rent" for the use of the rights-of-way. *See Cities of Dallas and Laredo v. FCC*, 118 F.3d 393, 397-98, (5th Cir. 1997), *citing City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92 (1893), *on rehearing*, 149 U.S. 465 (1893). The City Charter authorizes the City to base compensation for use of the streets on the payment of a percentage of gross receipts. City Charter § 33.

The Course of the Proceedings Below. The case below arose when plaintiffs, who were competitive local exchange carriers ("CLECs"), sought to build lines in the City. The plaintiffs had been providing services in White Plains on a resale basis since 1993, but had not installed facilities in the City's rights-of-way. In June 1996, plaintiffs contacted the City to discuss the installation of facilities in the City's rights-of-way. The City was also engaged in negotiations with several other providers during this period. Until the Ordinance was adopted in December 1997, the City had no ordinance or set procedure governing such requests.

On February 10, 1999, plaintiffs submitted an application for a franchise pursuant to the Ordinance. In May 1999, the City presented the plaintiffs with a draft of a franchise agreement with the plaintiffs' name on it (the "May Proposal"); this draft agreement was essentially identical to an agreement that the City had entered into with another

company, and that the City had earlier proposed as a model. Just one month later, on June 18, 1999, the plaintiffs brought suit for preemption of the ordinance and the May Proposal. In August 1999, White Plains sent the plaintiffs a revised draft of the franchise agreement, amending certain provisions to which the plaintiffs had objected (the "August Proposal"). Among other things, the August Proposal provided for payment of a franchise fee of 5% of annual gross revenues. August Proposal § 8.1 (Pet. App. 2d). The courts below based their decisions on the August Proposal.

Among the claims made by the plaintiffs were that the Ordinance and the August Proposal tended to prohibit the provision of telecommunications services within the meaning of Section 253(a) because the incumbent local exchange provider ("ILEC"), Verizon, was not required to (1) obtain a franchise and (2) pay the franchise fee. Verizon, through its predecessors, had been in the City's rights-of-way since before the City's incorporation in 1915, and since 1919 has provided free conduit for use by the City by way of *quid pro quo*. The total extent of that free conduit is now 11 miles, and it contains about a third of the City's municipal fiber communications network. The parties stipulated that the value of this free conduit use was not quantified.

The case below was tried before District Judge Parker on stipulated facts. Judge Parker upheld most of the provisions of the Ordinance and the August Proposal, including the compensation provisions, but held a number of provisions to be preempted by Section 253. Pet. App. 27a. Both parties appealed.

After briefing and oral argument, the court of appeals asked the FCC for its views on three questions. Post-Argument Questions for the Second Circuit and the FCC (Jan. 29, 2002) ("*Post-Argument Questions*"), Pet. App. 1c. In a supplemental brief, the FCC responded in general terms, providing only tentative answers.

In Part I of its discussion of the case, the court of appeals discussed the court's jurisdiction and the role of the FCC, stating that the language of Section 253 "counsel[s] against a conclusion that the FCC should decide those issues first." Pet. App. at 11a.

In reviewing the record *de novo* as a question of law (Part II of the opinion), the court of appeals looked to FCC precedents for guidance but found them to be "not controlling." Pet. App. at 14a.

In Part III of its opinion, the court of appeals examined the Ordinance in light of Section 253(a). The court of appeals concluded that two aspects of the Ordinance – and hence the Ordinance as a whole – "clearly have the effect of prohibiting TCG from providing telecommunications service" within the language of Section 253(a). Pet. App. at 15a. Specifically, the court cited the provision of Section 2.7-01(vii) of the Ordinance giving the Council "the right to reject any application based on any 'public interest factors ... that are deemed pertinent by the City,'" and the delay in TCG's receiving a franchise, and concluded that the Ordinance violated Section 253(a) because it posed "obstacles . . . to TCG's ability to compete . . . on a fair basis . . . ." Pet. App. at 15a.

The court of appeals then proceeded to test the contested provisions of the Ordinance and the August Proposal collectively and individually. In Part IV(A) of its opinion, the court first considered, but did not decide, whether the 5% franchise fee set forth in Section 8-1(a) of the August Proposal was "fair and reasonable" in amount. In Part IV(B) of its opinion, recognizing that the statutory phrase "competitively neutral and nondiscriminatory" did not require strict parity between providers, but only comparability, the court of appeals found the compensation provisions of the August Proposal in the aggregate not to be "competitively neutral and nondiscriminatory" on a going-forward basis. Pet. App. at 20a. In doing so, the court of

appeals rejected the district court's finding that the City's ongoing use of free conduit was sufficient to comply with Section 253(c).

In Part V, the court of appeals examined certain provisions of the Ordinance and the August Proposal that did not involve compensation. The court held that various regulatory provisions not "designed to 'manage the public rights-of-way,' as permitted by § 253(c)" were preempted because they "impermissibly" went beyond right-of-way management. Pet. App. at 24a.

In summary, the courts below upheld the vast majority of the provisions of the Ordinance. The district court upheld but limited the scope of application of two record-keeping and inspection requirements.[9] The district court struck provisions which required operators to provide, and the franchise to include, information regarding the services to be provided, as well as provisions which permitted the City to consider the technical, legal, and financial qualifications of the applicant.[10] The district court also struck provisions which permitted the City to consider the adequacy of a proposed agreement in protecting the public interest as well as provisions permitting the City to consider "other public interest factors or considerations" in reviewing an application.[11] The court of appeals upheld these rulings. In addition, the court of appeals struck the compensation provisions of the August Proposal because the City was not requiring comparable compensation of the incumbent. Finally, the court of appeals struck the

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[9] Ordinance, §§ 2-9-01(vi), (viii) (Pet. App. at 12b).

[10] Ordinance, §§ 2-3-02(ii), (vi), (vii); 2-7-01(ii); 2-9-01(ii) (Pet. App. at 7b-9b, 11b).

[11] Ordinance, §§ 2-7-01(vi); (vii); 2-9-01(xvii) (Pet. App. at 10b, 13b).

provisions that required City consent for assignments of a franchise, finding them too broad.[12]

There Is Great Confusion in the Lower Courts About How Section 253 Should Be Interpreted, and Only this Court Can Provide National Uniformity. White Plains is not alone. Local governments all across the United States have been attempting to reconcile their responsibilities as custodians of the public rights-of-way with the requirements of federal law ever since Section 253 was enacted. This has engendered considerable litigation, and as one commentator has stated, "instead of leading to a settled doctrine of law, the increased litigation continues to dispense wildly inconsistent judicial decisions." Gardner F. Gillespie, *Rights-of-Way Redux: Municipal Fees on Telecommunications Companies and Cable Operators*, 107 Dick. L. Rev. 209, 211 (2002). At least nine courts of appeals (the 1st, 2nd, 3d, 4th, 6th, 8th, 9th, 11th and District of Columbia Circuits) have issued opinions in cases involving the interpretation of Section 253.[13] At least two additional district court decisions are currently under appeal, one in the Ninth Circuit, and another in the Tenth.[14]

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[12] Ordinance, §§ 2-9-01(xii); August Proposal § 14 (Pet. App. 12b, 9d-13d).

[13] *Cablevision of Boston*, 184 F.3d 88; *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002); *New Jersey Payphone Ass'n, Inc., v. Town of West New York*, 299 F.3d 235 (3d. Cir. 2002); *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 212 F.3d 863 (4th Cir. 2000); *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000); *Missouri Municipal League v. FCC*, 299 F.3d 949 (8th Cir. 2002); *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 809 (2002); *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001).

[14] *Qwest Corp. v. City of Portland*, 200 F. Supp. 2d 1250 (D. Or. 2002), *appeal docketed*, No. 02-35473 (9th Cir. May 14, 2002); *Qwest Corp. v. City of Santa Fe*, 224 F.Supp.2d 1305 (D.N.M. 2002), *appeal docketed*, No. 02-2258 (Sept. 27, 2002).

The reported cases illustrate the lack of uniformity among the lower federal courts. Resolution of the inherent tension between subsection (a) and subsection (c) has proved difficult. There have been numerous expressions of perplexity among the courts of appeals in Section 253 cases.[15] From the outset the courts of appeals have found the syntax of Section 253 difficult to parse. *See, e.g., Cablevision of Boston,* 184 F. 3d at 100-01 (the syntax of Section 253 is difficult to parse); *BellSouth Telecomms, Inc. v. Town of Palm Beach,* 252 F.3d 1169, 1187 (2001) ("confusion arises because of perceived inconsistencies within the structure of [section 253];" *City of Abilene*, 164 F.3d at 52 ("oddity of [Section 253 (a)'s] formulation").[16] This constructional uncertainty underlay the circuit court's post-argument questions to the federal amici below. *See Post-Argument Questions*, Pet. App. 1c. The FCC's supplemental brief in response, particularly the answer to Question 2 on agency jurisdiction, offered only tentative views. *See* Pet. App. at 11a (FCC "declined to make definitive statements" on some issues).

The FCC's response to the post-argument questions demonstrates that the lower courts will not receive instruction in these matters from any source other than this Court. This is because Section 253(d) places the responsibility for parsing Section 253(c) in the hands of the courts. Thus, the FCC "respectfully refrain[ed]" from answering the Court's third post-argument question (Pet.

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[15] *See, e.g., New Jersey Payphone Ass'n,* 299 F.3d 235; *Town of Palm Beach*, 252 F.3d 1169; *Cablevision of Boston*, 184 F.3d 88. The Eighth Circuit in *Missouri Municipal League*, 299 F.3d at 954-55, recently read the applicability of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), to the preemptive effect of Section 253(a) differently from the D.C. Circuit in *City of Abilene v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999).

[16] This Court itself observed in *Iowa Utils. Bd.*, 525 U.S. at 397, that "It would be a gross understatement to say that the 1996 Act is not a model of clarity."

App. at 2c) on the meaning of the terms "competitively neutral and nondiscriminatory" in Section 253(c),[17] and the circuit court "agree[d] that the relevant FCC decisions are not controlling." Pet. App. at 14a. Unlike other provisions of the Communications Act, *cf. Texas & P. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) (holding under the predecessor of Section 203 that national uniformity requires exclusive primary jurisdiction), if there is to be any nationwide uniformity on the function of subsection (c), it must come from this Court.

The proper interpretation of Section 253 is important to both the national economy and the federal structure of our government. Telecommunications providers rely heavily on local rights-of-way to provide their services, and overseeing the construction, maintenance and use of rights-of-way is one of the principal tasks of local governments. Local governments recently have found that the task of managing their rights-of-way has been complicated by a spate of financial failures and sales of many competitive telecommunications providers. Posted on the website of counsel for petitioners[18] is a list of 59 bankruptcy proceedings involving telecommunications providers. In the past year the newspapers have been full of reports of sales of telecommunications providers and facilities. The sum total of all the turmoil is that it has become quite difficult for the cities and the public to identify which entity is responsible for safety violations in the public rights-of-way and for maintaining or removing facilities located in the public rights-of-way. It has also become more difficult to collect payment of compensation for use of the public rights-of-way. These are traditionally and quintessentially the responsibilities of local

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[17] Supplemental Brief of the Federal Communications Commission and the United States as Amici Curiae, filed in the court of appeals March 12, 2002, at 10.

[18] http://www.millervaneaton.com/hot_april3_c.htm.

governments, as Congress recognized when it drafted Section 253(c).

REASONS FOR GRANTING THE PETITION

I. The Structure of Section 253 Has Led to Great Confusion Among the Lower Courts, Which in this Case Led the Court of Appeals To Contravene the Decision of Congress To Preserve the City's Authority Over Public Rights-of-Way Management and Compensation.

In Section 253(c), Congress sought to carve out from the preemptive effect of Section 253(a) all matters dealing with the local governments' management of, and receipt of compensation for the use of, their public rights-of-way for private profit. Because the court of appeals' analysis did not properly reflect the relationship between Sections 253(a) and 253(c), the decision below resolves sensitive issues of intergovernmental relations contrary to the intent of Congress expressed in Section 253(c). As the Third Circuit recently noted, "Section 253 is quite inartfully drafted and has created a fair amount of confusion." *New Jersey Payphone Ass'n*, 299 F.3d at 240. This case offers the Court the opportunity to analyze Section 253 and to instruct the lower courts in its proper application. The decision of the Court of Appeals contains at least two critical instances of flawed analysis arising from confusion over the internal structure of Section 253.

A. "Unfair Competition" Is Not a Proper Ground for Preemption under Section 253(a)'s "Prohibitory" Test.

In Part III of its opinion, the court of appeals "conclude[d] that the Ordinance as a whole" – including the provisions carved out by subsection (c) – violated Section 253(a), Pet. App. at 15a, "in light of the obstacles that the Ordinance poses to TCG's ability to compete in White Plains

on a *fair* basis." Pet. App. at 15a (emphasis supplied). Section 253(a), however, says nothing about preemption on the basis of "fair competition" – it refers only to state and local laws that "prohibit" the provision of service.[19]

"Fair competition" therefore is not the standard Congress prescribed in Section 253 to govern inter-governmental relations. Under the statute, the adjective "fair" applies only to the level of compensation sought to be charged the carrier, and that adjective appears only in Section 253(c). *Cablevision of Boston, supra*, at 105. Furthermore, subsection (a) allows only express preemption, and Section 601(c)(1) instructs that implied preemption will not do. Preemption is limited to certain *prohibitory* regulation.

Although *Dearborn*, 206 F.3d 618, is closely analogous on its facts to this case, the court in that case found no prohibition and did not apply a "fair competition" standard in interpreting Section 253(a). The Second Circuit is the only court of appeals that has applied the "fair competition" standard in determining whether a local requirement is preempted under Section 253(a).

In applying a fair competition test to the ordinance as a whole – rather than confining it to compensation in accord with the statute – the court of appeals improperly gave

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[19] The Court of Appeals did not offer an extensive explanation of the "obstacles" posed by the Ordinance. The two specific concerns cited by the court were the provision of the Ordinance allowing the Common Council to consider "public interest factors," and the "extensive delays" in processing the plaintiffs' request for a franchise. The former issue is addressed at Point II, *infra*. It is unclear what specific "delay" concerned the court. The parties had engaged in talks at various times before and after the adoption of both the 1996 Act and the City's Ordinance. The plaintiffs submitted a formal application for a franchise, as required by the Ordinance, only four months before they filed their complaint. In any case, it is impossible to tell from the court's opinion how much weight was given to either of the two specific "obstacles" the court cites, or to any other factors.

preeminence to the overall pro-competitive purpose of the 1996 Act rather than to the specific anti-preemptive purposes of subsection (c).[20] In enforcing its notion of "fairness," the court of appeals thus ignored the fundamental proposition of statutory construction that general intent does not override the intent of particular provisions to the contrary. *See Rodriguez v. United States*, 480 U.S. 522, 526 (1987) ("it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law"); *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) ("[i]nvocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise").

The Second Circuit's replacement of prohibitory effect with fairness is particularly inappropriate because subsection (c) was the result of intense parliamentary maneuvering and debate in the House of Representatives. The language adopted reflected a deliberate rejection on the House floor of the more pre-emptive language reported by the Committee. *See* 141 Cong. Rec. H8460 (daily ed. Aug. 4, 1995); *see also* discussion at pp. 26-27, *infra*.

Finally, this Court has independently determined that the overall pro-competitive purpose of the 1996 Act does not require that all burdens be lifted from competitors. In considering the "necessary and impair" standard of Section 251(d)(2), which is a much less stringent test than the "prohibitory" standard of Section 253(a), this Court rejected

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[20] In its discussion of Section 253(a), the court of appeals cited an FCC decision that referred to whether a local ordinance "inhibits or limits the ability . . . to compete in a fair and balanced . . . environment. *In re California Payphone Ass'n*, Memorandum Opinion and Order, 12 FCC Rcd. 14,191, at ¶ 31 (1997). The Court had earlier concluded that FCC decisions were "not controlling," however, and it did not expressly adopt this formulation as the standard for interpreting Section 253(a). Pet. App. at 14d.

"the Commission's assumption that *any* increase in cost (or decrease in quality) imposed by denial of a network element renders access to the element 'necessary,' and causes the failure to provide that element to 'impair' the entrant's ability to furnish its desired services . . . ." *Iowa Utils. Bd.*, 525 U.S. at 389.

B. Section 253(a) Does Not Authorize Preemption of Severable Provisions that Are Themselves Not Prohibitory.

The court of appeals mis-analyzed the interrelationship and the order of precedence between subsections (a) and (c) of Section 253. The court preempted various provisions of the Ordinance and the August Proposal on the ground that they fell outside the subsection (c) carve-out, without next making the statutorily required finding that those provisions were prohibitory, and therefore within the court's preemptive authority under subsection (a).

In other words, the court of appeals first found the Ordinance as a whole to be a prohibition within the meaning of Section 253(a). The court then proceeded to examine certain individual provisions of the Ordinance and determined that they were not related to management or compensation; not being related to management or compensation, they were deemed preempted solely because the Ordinance as a whole had been declared a "prohibition."[21] But in declaring those individual provisions to be preempted, the court did not consider whether each of the invalidated provisions was itself a prohibition. This kind of bootstrapping is not only illogical, but prohibited by the language of subsection (c).

Subsection (c) can best be understood as an instruction to the courts on how subsection (a) is to be

[21] These provisions include §§ 2-3-02(ii), (vi), (vii); 2-7-01(ii), (vi), (vii); 2-9-01(ii), (xii), (xvii) of the Ordinance, as well as a number of sections of the August Proposal (Pet. App. at 7b-13b).

construed. It uses the language "nothing in this section [253] affects the authority of a State or local government...." As this Court observed of Section 2(b) of the Communications Act ("[N]othing in this Act shall be construed...."), 47 U.S.C. § 152(b), in *Louisiana PSC v. US and FCC*, 476 U.S. 355, 377 n.5 (1986), the section:

> provides its own rule of statutory construction. In other words, the Act itself, in § 152(b), presents its own specific instructions regarding the correct approach to the statute which applies to how we should read § 220.

With respect to the Communications Act, the Court's decision in *Louisiana PSC* teaches that "nothing means nothing." Thus, literally nothing in Section 253(a) – or subsection (d), for that matter – touches or concerns the localities' right-of-way management and compensation responsibilities.

Instead of applying the correct analysis, the court of appeals offered a rationale to justify its failure to follow the literal language of the statute, *viz.*:

> While we conclude that the Ordinance as a whole violates § 253(a), we must nevertheless analyze whether portions of the Ordinance ... are saved by § 253(c). .... [A]pplying § 253(c) to individual provisions without considering the Ordinance as a whole would neglect the possibility that a town could effectively prohibit telecommunications services through a combination of individually non-objectionable provisions.

Pet. App. at 15a-16a.[22] This theory, however, is squarely blocked by the language of subsection (c) that says – without qualification or limitation – that *nothing* within the right-of-way management authority is "affected" by the preemptive language in subsection (a).

This Court has always made it plain that a preemptive interpretation is not favored. *See, e.g., Building and Constr. Trades Council v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 224 (1993). Here there not only is no language supporting preemption of provisions within the scope of 253(c), but there is instead language that clearly negates preemption of such provisions.

Moreover, in the case of a potential conflict between a federal statute and a state statute, the inter-governmental doctrines applied by this Court require the state provision to be narrowly construed to avoid or to minimize preemption wherever possible. *See, e.g., Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985). The court of appeals noted with approval the district court's limiting construction of two provisions requiring the franchisee to maintain records and to allow inspection. Pet. App. at 23a. But it did not itself apply that principle, presumably because it was considering the impact of the ordinance "as a whole."

An argument might be made for the court's analytical scheme if the question were limited to non-severable provisions.[23] But the court of appeals similarly did not pause

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[22] The opinion continues by "not[ing] that the district court applied this methodology and neither party objected." In its opening brief before the court of appeals, however, the City specifically noted that the non-fee provisions "do not even arguably prevent TCG from offering service under Section 253(a)." Initial Brief of Appellee/Cross-Appellant City of White Plains, filed July 19, 2001, at p. 46. The City thus objected to the procedure the court of appeals actually applied.

[23] The court of appeals did not disturb the district court's findings of severability, based on its reading of New York state law. Pet. App. at 44a, n.7.

to consider whether any of the provisions it struck down were severable, again presumably because it relied on them under its aggregative prohibition theory.

In sum, the court of appeals contravened the express intent of Congress by preempting individual provisions that were not shown to be prohibitory. This is an important question of federal law, because until it is resolved, the courts will not know how to properly analyze local ordinances, and local governments will not know the true scope of their authority.

II. In Holding that Section 253(c) Requires the City to Charge the Same Franchise Fees to Non-comparably Situated Carriers on a Going-Forward Basis, the Decision of the Court of Appeals Conflicts Directly with the Intent of Congress and a Decision of Another Circuit.

The court of appeals preempted the compensation provisions of the August Proposal because (1) the Ordinance as a whole violated subsection (a); Pet. App. at 15a, and (2) the compensation provisions discriminated in favor of Verizon, the incumbent provider, and so were not excepted under subsection (c). In so ruling, the court of appeals misconstrued both subsections. Furthermore, in finding White Plains's proposed five percent franchise fee to violate subsection (c), the court of appeals expressly declined to follow the contrary result in the Sixth Circuit's *Dearborn* case. Pet. App. at 21a. In *Dearborn*, the court upheld a franchise fee of four percent of gross revenues that applied to the CLEC but not the ILEC.[24] There is thus a clear split between the Second and Sixth Circuits on this issue.

The District Court found in the record "no basis to conclude that the fees sought would likely render doing

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[24] *Dearborn*, 206 F.3d at 624-25, *aff'g* 16 F. Supp. 2d 785 (E.D. Mich. 1999).

business with the City unprofitable." Pet. App. at 58a. In its review *de novo*, the court of appeals made no contrary finding of fact. Rather it found only that "the ordinance as a whole violates § 253(a)...." Pet. App. at 15a. That finding, in turn, was based on the court's own conclusion that the ordinance posed "obstacles ... to TCG's ability to compete ... on a fair basis...." *Id.* As discussed above, preemption of the entire Ordinance on this basis is not justified by the language and intent of Section 253(a). In addition, the court of appeals never made an independent finding that the August Proposal itself constituted a prohibition. For the reasons discussed at Point I.B., *supra*, the Second Circuit's application of Section 253 was thus incorrect and the court's analysis internally inconsistent.

The court seems to have presumed either that there is no difference between the historical positions and legal rights of Verizon and the plaintiffs, or that Section 253(c) demands that all past circumstances and factual distinctions be ignored.

In fact, the positions of Verizon and the plaintiffs are factually distinct and not comparable. The bargain that was struck between Verizon's predecessors and the City a century ago[25] contained a heavy universal service component. Part of the regulatory compact between the franchisor and the franchisee was the extension of service to previously unserved customers. Indeed, one of Congress's purposes in enacting the Communications Act was "to make available, so far as possible, to all the people of the United States ... a ...Nation-wide ... communication service...."[26] In return for access to the City's rights-of-way, the company

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[25] As alluded to in Part IV(B) of the court of appeals' opinion. Pet. App. at 20a, 23a.

[26] Section 1 (Purposes of the Act, Creation of Federal Communications Commission), 47 U.S.C. § 151. Section 254 (Universal Service), 47 U.S.C. § 254, added in 1996, elaborates on the principle recognized in Section 1.

undertook an obligation to extend telephone service to the taxpayers of the City. This regulatory compact entailed a large capital expenditure over many years.

Verizon to this day remains burdened by an obligation to serve. *See, e.g., In re MCI Telecomms. Corp.*, Case 98-C-0799, 1998 WL 1031962 (N.Y.P.S.C. Dec. 7, 1998). In contrast, the modern-day CLECs, such as plaintiffs, do not provide a universal service *quid pro quo*. They are under no commitment to make the kinds of investments to benefit the public interest that the ILECs did – nor do they have any continuing obligation to maintain an extensive residential network so that they can continue to provide such service.

Furthermore, Section 253(c) does not demand comparability between ILECs and CLECS. The language of the statute does not demand identical treatment, as the Second Circuit recognized. Pet. App. at 22a. But the court did not follow its own holding, because it ignored the value to the City of its current use of the 11 miles of conduit provided by Verizon at no charge. Merely because the value has not been determined does not mean the continuing right to use the conduit has no value. Even if Verizon's past expenditures were properly ignored, the court should have remanded the case for a valuation of the right to use the conduit.[27]

Nor does the language of subsection (c) preclude consideration of differences in other circumstances between ILECs and CLECs. In fact, the lack of comparability was specifically recognized in the course of the debate on the House floor that led to the rejection of the so-called "parity

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[27] The court of appeals noted that under the August Proposal the plaintiffs would also be required to provide conduit as if that disposed of the issue. Pet. App. at 23a. But the amount of free conduit requested was only nominal – merely 1000 feet – and therefore far less in value and cost than the 11 miles now provided by Verizon. *See* August Proposal, § 8.2 (Pet. App. at 4d).

amendment." By a vote of 338-86 the House voted to replace the "parity amendment" with the "Barton-Stupak amendment," which eventually became subsection (c). The opponents of strict parity specifically adverted to the different postures of the ILECs and CLECs. Congressman Stupak stated:

> Local governments must be able to distinguish between different telecommunications providers . . . . The manager's amendment states that local governments would have to charge the same fee to every company, regardless of how much or how little they use the rights-of-way or rip up our streets. Because the contracts have been in place for many years, some as long as 100 years, if our amendment is not adopted, if the Barton-Stupak amendment is not adopted, you will have companies in many areas securing free access to public property. Taxpayers paid for this property, taxpayers paid to maintain this property, and it is simply not fair to ask the taxpayers to continue to subsidize the telecommunications companies . . . .

141 Cong. Rec. H8460 (daily ed. August 4, 1995). Congressman Barton stated a similar intent:

> [The amendment] explicitly guarantees that cities and local governments have the right not only to control access within their city limits, but also to set the compensation level for the use that rights of way . . . . The Federal Government has no business telling State and local governments how to price access to their right-of-way.

141 Cong. Rec. H8460 (daily ed. August 4, 1995).

What is plainly apparent from the floor debate is that the intent of Section 253(c) was not to give the CLECs a "free ride" in the public rights-of-way.

By enacting Section 253 Congress did not intend to displace any existing franchises or similar rights of the ILECs. Yet what the court of appeals did here was to preemptively displace the existing regulatory compact between Verizon and the City on a going-forward basis by requiring a new *quid pro quo* other than that originally bargained-for by the parties, in different times under different circumstances.

III. The Courts' Facial Preemption of the Ordinance Provisions Allowing the City To Consider the Public Interest was Unnecessary, Premature, and in Conflict with Relevant Decisions of this Court.

The courts below preempted various provisions of the Ordinance that allowed the City to consider "public interest factors" or "the public interest" in reviewing applications and granting right-of-way franchises. The court of appeals noted that one such provision, § 2.7.01(vii) of the Ordinance, "clearly ha[d] the effect of prohibiting TCG from providing telecommunications service." Pet. App. at 15a; *cf.* Pet. App. at 48a.

> In particular, the provision that gives the Common Council the right to reject any application based on any "public interest factors ... that are deemed pertinent by the City" amounts to a right to prohibit providing telecommunications services, albeit one that can be waived by the City. *See* Ordinance, § 2.7-01(vii).

Pet. App. at 15a.[28]

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[28] The Ordinance actually refers to "public interest factors or considerations *that the city has a lawful right to consider* . . . ." (cont.)

In so doing, the court of appeals applied a standard of review akin to strict scrutiny, rather than deferring to the judgment of the non-federal legislative body. The Common Council of the City is entitled to deference because local enactments carry a strong presumption of validity. *McGowan v. Maryland*, 366 U.S. 420 (1961). Furthermore, this Court has held that "[t]here is no presumption that the power [of a local board] will be arbitrarily exercised . . . ." *People of the State of New York v. Van De Carr*, 199 U.S. 552, 562 (1905).

In addition, a public interest standard is not void for vagueness, and has been upheld by this Court. *New York Securities Corp. v. U.S.*, 287 U.S. 12, 24 (1932). Indeed, the Communications Act itself requires the Commission to act in accordance with the "public interest." *See, e.g.*, 47 U.S.C. §§ 252(e)(2)(A), 303; *National Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943) (public interest standard "'is as concrete as the complicated factors for judgment in such a field of delegated authority permit'") (citation omitted).

The court of appeals therefore had no basis in law for rejecting any provision of the Ordinance merely because it allows the City to consider the public interest. The "public interest" provisions could only be deemed invalid if actually applied in a manner contrary to law. Instead, the court presumed that White Plains would act contrary to law in every single circumstance, even though the City never even invoked any of the "public interest" provisions.

The courts below should have followed the jurisprudential principle that a legislative enactment is valid

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(continued) Ordinance § 2.7-01(vii) (emphasis added). Pet. App. at 10b. The limitation to factors that the City has "a lawful right to consider" would seem to remove any objection the court might have had. Why the court did not quote or discuss the full text is unclear. The remaining public interest provisions contained similar limitations. Ordinance, §§ 2.7-01(vi); 2.9-01(xvii) (Pet. App. at 10b, 13b).

if there is any situation in which it could properly be applied. *United States v. Salerno*, 481 U.S. 739, 745 (1987). The contrary rule – that the legislative enactment is invalid if there is any situation in which it could not properly be applied – applies only in the limited context of regulation of speech. *See, e.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). The proper test in this situation is the former.

IV. The Preemption of Provisions Reserving Discretion To Approve a Transfer or Initial Grant of a Franchise Conflicts with Relevant Decisions of This Court, Because It Relies on an Interpretation of Section 253 That Needlessly Raises Constitutional Questions.

The court of appeals held that Section 2-9-01(xii) of the Ordinance and Section 14 of the August Proposal were preempted because of the "unfettered breadth of the provision[s] . . ." Pet. App. at 25a. These provisions govern transfers of a franchise. Pet. App. at 12b, 9d-13d. The court apparently also objected to Section 2.7-01(vii) of the Ordinance, discussed *supra* at II, for the same reason. In rejecting these provisions, the court of appeals adopted an interpretation of Section 253 that needlessly raises Constitutional issues. *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988).

The court's rationale seems to have been that these three provisions would allow the City to deny entrance to an applicant, either for an initial franchise or for the transfer of a franchise. Reserving the right to turn even a single person away, even for what might prove to be a perfectly valid reason, apparently constitutes a Section 253(a) "prohibition" in the eyes of the court of appeals. The opinion below thus can be read to mean that the City must allow any

telecommunications provider access to the rights-of-way on a purely ministerial basis, without the exercise of any discretion. Such a reading conflicts with the Sixth Circuit's holding in *Dearborn*, 206 F.3d at 624, rejecting the claim that a franchise requirement is a prohibition as mere "sophistry."

Such a reading would also violate at least three constitutional provisions. First, it exceeds Congressional power under the Commerce Clause. In *Printz v. United States*, 521 U.S. 898, 933 (1997), this Court held that Congress could not impose the burden of a federal regulatory program on the states. In this case, Congress has mandated that the City allow entry to multiple providers. Managing the rights-of-way is a much simpler task for the City when there is only one provider, however, so by directing the City to allow multiple entrants Congress imposed a significant new burden on the City in the name of federal policy. The First Circuit has held that Section 253 does not permit local governments to be "commandeered via § 253 to solve problems created by others." *Cablevision of Boston*, 184 F.3d at 105. It is therefore arguable that the new federal policy violated the principle of *Printz*, and that Section 253 itself is unconstitutional. But the more important point in this case is that the court of appeals went further, and read Section 253 as preventing the City from exercising any discretion at all over who uses its property. City officials are thus "put in the position of taking the blame for [the] burdensomeness and . . . defects [of the federal policy]" *Printz*, 521 U.S. at 930, without recourse or opportunity for redress.

The preemption of all local discretion regarding who may use the public rights-of-way also raises concerns under the Guaranty Clause.[29] The Guaranty Clause precludes the federal government from interfering with a state's

[29] The Guaranty Clause, U.S. CONST. art. IV, § 4.

distribution of state power among the various levels of government. The D.C. Circuit recognized this principle in the context of Section 253 in *City of Abilene v. FCC*, 164 F.3d 49, 52 (1999) ("interfering with the relationship between a State and its political subdivisions strikes near the heart of State sovereignty").

Similarly, if Section 253 eliminates the City's discretion to decide who may occupy its rights-of-way, then Section 253 has taken the City's right to exclude, in violation of the Takings Clause of the Fifth Amendment. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982).

There is no evidence that Congress meant to sweep so broadly, and Section 253 can be read more narrowly. By preempting the provisions in question, however, the court of appeals improperly raised all three issues.

Conclusion

The City's petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 10, 2003

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2001

(Argued: December 3, 2001 Decided: September 12, 2002)

Docket Nos. 01-7213(L) & 01-7255(XAP)

TCG NEW YORK, INC., TC SYSTEMS, INC. and TELEPORT COMMUNICATIONS d/b/a TCNY,

Plaintiffs-Appellants-Cross-Appellees,

-- v. --

CITY OF WHITE PLAINS,

Defendant-Appellee-Cross-Appellant.

Before:

WALKER, *Chief Judge*,
NEWMAN and F.I. PARKER, *Circuit Judges*.

Plaintiffs TCG New York, Inc., TC Systems, Inc., and Teleport Communications d/b/a TCNY brought an action against the City of White Plains alleging that White Plains's franchising ordinance and proposed franchise agreements violated § 253 of the Telecommunications Act of 1996, 47 U.S.C. § 253, the Fourteenth Amendment, and state law. The District Court for the Southern District of New York (Barrington D. Parker, Jr., then-*District Judge*) decided the case on stipulated facts and held in part for TCG and in part for the City.

Affirmed in part and reversed in part.

PETER D. KEISLER, Sidley Austin Brown & Wood (Stephen B. Kinnaird, Sidley Austin Brown & Wood, Robert G. Scott, Jr., and T. Scott Thompson, Cole, Raywid & Braverman, Washington, DC, Mark C. Rosenblum, Stephen C. Garavito, and Teresa Marrero, AT&T Corp., Basking Ridge, NJ, on the brief), Washington, DC *for Plaintiffs-Appellants-Cross-Appellees.*

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ANDREW BRICK, Counsel, Albany, NY *for Amicus Curiae New York State Conference of Mayors and Municipal Officials in support of City of White Plains.*

WILLIAM MALONE, Miller & Van Eaton (Nicholas Miller and Matthew C. Ames, Miller & Van Eaton, Henry W. Underhill, General Counsel and Executive Director, and Lani L. Williams, Associate Counsel, International Municipal Lawyers Association, Washington, DC, Danielle DeMers, Office of the Town Attorney, Town of Colonie, Newtonville, NY, on the brief) Washington, DC *for Amici Curiae Local Governments in support of City of White Plains.*

JOHN M. WALKER, JR., *Chief Judge*:

Plaintiffs TCG New York, Inc., TC Systems, Inc., and Teleport Communications d/b/a TCNY (collectively, "TCG") brought an action against the City of White Plains

(the "City" or "White Plains") alleging that White Plains's franchising ordinance and proposed franchise agreements violated § 253 of the Telecommunications Act of 1996 ("TCA"), 47 U.S.C. § 253 ("§ 253"), the Fourteenth Amendment, and state law. The District Court for the Southern District of New York (Barrington D. Parker, Jr., then-*District Judge*) decided the case on stipulated facts and held in part for TCG and in part for the City. Both sides appealed. We affirm in part and reverse in part.

BACKGROUND

TCG, a provider of telephone and telecommunications services, is a group of wholly-owned subsidiaries of Teleport Communications Group, itself a wholly-owned subsidiary of AT&T Corporation. For purposes of this appeal, TCG can be treated as a unitary entity. In order to provide telecommunications services within White Plains, TCG sought the City's approval to construct telecommunications facilities and place other equipment within the City's public rights-of-way. In particular, TCG sought permission to build new conduits and to run a network of fiber optic cables through both these new conduits and preexisting ones in the City. Although TCG negotiated with the City starting in early 1992, the relevant negotiations are those that took place after December 1, 1997, when the Common Council of the City passed an ordinance providing a process by which telecommunications carriers could gain approval to place equipment in the City's rights-of-way. *See* White Plains Municipal Code, Telecommunications Franchising and Licensing, Articles 1-3 (the "Ordinance").

TCG filed an application for a revocable license in April 1998. Under the City's scheme, revocable licenses govern limited uses of rights-of-way for internal operations of a business, whereas franchises govern uses of rights-of-way on

a broader scale to sell or resell telecommunications services to residents of the City. *See* Ordinance, §§ 1-1-07, 1-1-12, 2-1-02, 2-1-06, and 2-1-07. In June 1998, the City's Corporation Counsel suggested that TCG apply for a franchise, rather than a revocable license, and provided TCG with a copy of a franchise agreement it had reached with one of TCG's competitors. After some negotiations over the terms of a franchise agreement, TCG submitted an application for a franchise in February 1999 and effectively discontinued pursuing a revocable license. In June 1999, TCG filed this lawsuit, alleging that White Plains's Ordinance and the proposed franchise agreement violated its rights under the TCA, the Fourteenth Amendment, and state law. In August 1999, White Plains made a new franchise agreement proposal (the "August Proposal"). This case concerns the validity of both the Ordinance and certain provisions in the August Proposal as amended.

Section 253 of the TCA provides, in relevant part:

> (a) In general. No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) State regulatory authority. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with [47 U.S.C. §254], requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> (c) State and local government authority. Nothing in this section affects the authority of a State or local

> government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.
>
> (d) Preemption. If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

47 U.S.C. § 253.

The Ordinance forbids any telecommunications provider from using the rights-of-way of the City without obtaining a franchise or revocable license from the Common Council and that incorporates the requirements of the Ordinance. *See* Ordinance, §§ 2-1-01, 2-1-03. Applications for franchises are required to contain numerous disclosures. Some of these disclosures, which relate to basic management of the rights-of-way, are not disputed. *See* Ordinance, § 2-3-02(i), (iii), (iv), (v), and (viii).

Disclosures required by the Ordinance that are challenged in this action include a description of the telecommunications services that the franchisee seeks to provide; the proposed financing plans for constructing and operating the applicant's telecommunications system; and a description of the "legal, financial, technical and other appropriate qualifications of the applicant." *Id.* at (ii), (vi), and (vii). In addition to these disclosures, the Ordinance

requires that franchise agreements contain terms that specify what telecommunication services are to be offered, require the franchisee to maintain accurate records, and grant the City a right to inspect records and facilities. *See* Ordinance, § 2.9.01 (ii), (viii), and (vi).

The Ordinance also contains a variety of substantive requirements. Franchises may not be transferred without the prior consent of the City. *See id.* at (xii). Franchise agreements must contain any additional provisions the City deems "necessary or appropriate in furtherance of the public interest." *Id.* at (xvii). Similarly, before approving a franchise, the Common Council may consider the qualifications of an applicant, whether the franchise agreement "protect[s] the public interest," and "any other public interest factors." Ordinance, § 2-7-01(ii), (vi), and (vii).

TCG's attack is not confined to the Ordinance, but also challenges a number of the terms contained in the August Proposal. Of central importance to this appeal is a fee provision that requires TCG to pay five percent of its annual gross revenues from White Plains business to the City. *See* August Proposal, § 8.1(a). The fee provision also sets a minimum annual fee and requires TCG to provide White Plains with free conduit space for its own use if TCG constructs new conduits. *Id.* at §§ 8.1(b), 8.2. White Plains also included in its August Proposal a "most favored vendee" clause, whereby TCG is required to offer services to the City on terms that are at least as good as the terms TCG offers to any other governmental or non-profit customer in Westchester County. *Id.* at § 2.7. To ensure that franchise fees would be paid, White Plains also included provisions requiring a secondary guaranty from AT&T, TCG's corporate parent, to pay any fees that TCG defaults on and requiring TCG to maintain financial records at a fixed

location available for the City's inspection. *Id.* at §§ 16, 12.1, 12.2 and 8.5.

Beyond the foregoing financial provisions, the August Proposal precludes TCG from transferring the franchise or ownership of more than twenty percent of TCG without prior consent from White Plains, implementing § 2-9-01(xii) of the Ordinance. *See* August Proposal, § 14. The August Proposal also requires TCG to seek prior City approval for installations of any part of the network within its boundaries, including installations that are exclusively on private property. *Id.* at §§ 11.9(d) and 12.3. Finally, the City insisted on provisions that waive TCG's right to challenge provisions of the August Proposal or the Ordinance in court. *Id.* at §§ 3.1(4) and 13.6.

Although the City has entered into franchise agreements pursuant to the Ordinance with some telecommunications providers, it has not required any formal franchise agreement from the incumbent provider, Verizon, formerly known as Bell Atlantic, NYNEX, and New York Telephone. Moreover, Verizon is not required to pay any franchise fee. While Verizon and its predecessors have provided the City with free conduit space since 1919, the value of the free conduit space has never been estimated.

TCG argued before the district court that the Ordinance and the August Proposal violated § 253 because 1) they "prohibit or have the effect of prohibiting" TCG's ability to provide telecommunications services;2)they amount to prohibited regulation that go beyond management of the public rights-of-way; and 3) they require TCG to pay compensation that is neither "fair and reasonable" nor sought "on a competitively neutral and nondiscriminatory basis." Additional claims advanced by TCG under the Constitution

and state law were rejected by the district court and are not appealed.

Applying § 253 of the TCA, the district court found that the Ordinance had the effect of prohibiting TCG from providing telecommunications services. However, it concluded that portions of the Ordinance and August Proposal were saved by § 253(c), the statute's savings clause, including the licensing fee. The district court also concluded that substantial portions of the Ordinance and the August Proposal were invalid because they were not confined to managing the public rights-of-way, but rather impermissibly regulated telecommunications. Both sides appealed.

DISCUSSION

I. Jurisdiction

The first matter that needs to be considered is whether this court has jurisdiction to resolve TCG's claims. One circuit court has held, in the context of TCA litigation, that if no private cause of action is created by a statute, the federal courts lack subject matter jurisdiction. *See TCG Detroit v. City of Dearborn*, 206 F.3d 618, 622-24 (6th Cir. 2000) (holding that, because the existence of a cause of action goes to subject matter jurisdiction, courts must determine whether an implied cause of action is created sua sponte, and then concluding that § 253 does imply a private cause of action). White Plains does not argue that there is no private cause of action, but if the issue were jurisdictional, we would have to determine it nonetheless. The Sixth Circuit's reliance on *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804 (1986), is misguided. *Merrell Dow* addressed the issue of whether federal question jurisdiction exists when a plaintiff brings a state cause of action that depends on a federal statute that

does not create a private cause of action. *Id.* at 808-19. It did not reach the question of whether the existence of a federal cause of action is jurisdictional. However, the Supreme Court has since squarely decided the issue, holding that "[t]he question whether a federal statute creates a claim for relief is not jurisdictional." *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 365 (1994). Accordingly, since White Plains does not argue that there is no private cause of action, we need not reach the issue.

We must also consider whether the action should be dismissed under the doctrine of primary jurisdiction. Primary jurisdiction is a judge-made doctrine intended to promote proper relationships between the courts and administrative agencies. *Johnson v. Nyack Hosp.*, 964 F.2d 116, 122 (2d Cir. 1992). The doctrine serves two principal interests: "consistency and uniformity in the regulation of an area which Congress has entrusted to a federal agency; and the resolution of technical questions of facts through the agency's specialized expertise, prior to judicial consideration of the legal claims." *Golden Hill Paugussett Tribe v. Weicker*, 39 F.3d 51, 59 (2d Cir. 1994). We have also cited judicial economy as an interest that the primary jurisdiction doctrine can serve. *Johnson*, 964 F.2d at 123.

As a preliminary matter, we note that the Federal Communications Commission ("FCC") filed an amicus brief in this case and, at our request, provided supplemental briefing on both the issue of where jurisdiction to decide this case lies and on the substantive issues to be determined. The FCC did not definitively state an opinion on whether it has concurrent jurisdiction with the district courts over § 253, but it did outline several reasons to think that jurisdiction should be concurrent. For example, the FCC noted that § 253 does not use language, included elsewhere in the TCA, that confers exclusive jurisdiction in the Commission. *See,*

e.g., 47 U.S.C. § 255(f). The absence of such language does not foreclose primary jurisdiction, however, because primary jurisdiction goes to the issue of when, not whether, courts should consider issues. But it does counsel against a conclusion that the FCC should decide these issues first.

Amicus briefs from an agency can serve much of the interest in consistency and uniformity of law that underlies the doctrine of primary jurisdiction, while avoiding some of the delay that sometimes results from dismissing on the ground of primary jurisdiction. *See* 2 Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 14.6, 304 (3d ed. 1994). On the substantive issues, the FCC expressed opinions as to some issues but declined to make definitive statements on others, such as the questions of whether a gross revenue fee could be "fair and reasonable compensation," compensation should be limited to a local government's costs, or some other formula is appropriate. While the FCC's response was not exhaustive, it was informative on some issues.

In considering primary jurisdiction, we think it is significant that the parties in this case stipulated to the facts. Although we acknowledge that an agency's role in "marshaling [the facts] into a meaningful pattern", *Fed. Mar. Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 498 (1958), does cover some cases where the underlying facts are not in dispute, we also believe that where the facts are undisputed, it will rarely be appropriate to dismiss on the basis of primary jurisdiction. In addition, disputes over whether a local ordinance violates § 253 will often be factually straightforward. The difficult questions in this area are normally the legal questions, which means that the important concern for determining issues of primary jurisdiction is "consistency and uniformity in . . . regulation." Considering the "relatively narrow scope of the doctrine of primary jurisdiction," *Goya Foods, Inc. v. Trop-*

icana Prods., 846 F.2d 848, 851 (2d Cir. 1988), the fact that all of the issues here are questions of law, and having received the FCC's views on some of the issues, we decline to dismiss on the basis of primary jurisdiction.

II. Standard of Review

Because, as we have noted, the parties stipulated to all facts, the district court's conclusions are exclusively conclusions of law that are reviewed *de novo*. *See, e.g., Gen. Elec. Co. v. Comm'r*, 245 F.3d 149, 154 (2d Cir. 2001). The parties disagree over whether the court should defer to the judgments of the FCC under *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984). TCG, supported by the federal government's amicus brief, argues that deference is required because the FCC has authority to administer the entirety of Chapter 5 of Title 47 (the Wire or Radio Communications chapter), except as specific provisions of the chapter provide. *See* 47 U.S.C. § 151 ("there is created a commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter."); 47 U.S.C. § 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.").

White Plains primarily argues that deference is inappropriate because § 253(d), by omitting reference to § 253(c), removed disputes involving § 253(c) from the FCC's jurisdiction. § 253(d) provides that:

> [i]f, after notice and an opportunity for public comment, the [FCC] determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this

> section, the [FCC] shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

47 U.S.C. § 253(d).

White Plains argues that the legislative history of subsection (d) establishes that it was intended to deprive the FCC of jurisdiction over issues involving the interpretation of subsection (c). A prior version of subsection (d) that required the FCC to preempt any local provisions that violated § 253 was defeated and replaced by the current provision. Several circumstances, however, make it difficult to accept White Plains's argument. First, White Plains argues elsewhere that subsection (c) is a savings clause that creates no independent restrictions but rather permits certain restrictions that would otherwise have been prohibited by subsection (a). Although this argument is not necessarily inconsistent with White Plains's jurisdictional argument, the plain language of the text which allows the FCC to preempt provisions inconsistent with subsection (a) strongly implies that the FCC has the ability to interpret subsection (c) to determine whether provisions are protected from preemption. Second, the provisions of § 253(d) are mandatory: the FCC "shall preempt" local statutes to remedy violations of § 253(a) or (b). In light of the FCC's general regulatory authority, the inclusion of a mandatory regulatory role does not logically foreclose FCC action in the areas where it is not mandatory. Third, because § 253(c) provides a defense to alleged violations of § 253(a) or (b), if § 253(d) were read to preclude FCC consideration of disputes involving the interpretation of § 253(c), it would create a procedural oddity where the appropriate forum would be determined by the defendant's answer, not the complaint. It is true that the well-pleaded complaint rule is a matter of statutory construction, not a constitutional requirement for

jurisdiction. *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908). Thus, Congress could choose to apply a different rule under some circumstances, and indeed courts have recognized some exceptions. *See, e.g., Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987) (describing ERISA preemption as so complete that a complaint raising only state-law claims is necessarily federal in nature because of the preemption defense and so may be removed). However, we will not assume that Congress made such a choice here without stronger evidence.

Although the language of §253(d) supports the conclusion that cases such as this one should not be dismissed under the doctrine of primary jurisdiction, it does not support the conclusion that no deference is owed to the FCC. Consequently, the FCC's decisions interpreting the scope of § 253(c) merit some deference. *See Olmstead v. Zirming*, 527 U.S. 581, 598 (1999) (agency views entitled to be consulted for helpful guidance even if not *Chevron* deference); *Reno v. Koray*, 515 U.S. 50, 61 (1995) (agency guideline, not subject to rigors of Administrative Procedure Act, entitled to "some deference").

White Plains also argues that under *Chevron*, the statute is sufficiently clear that there is no basis for deference and that the relevant FCC decisions do not control this case. *See Chevron*, 467 U.S. at 842-43. Although we do not reach the issue of whether the statute is sufficiently clear to eliminate the need for deference, we agree that the relevant FCC decisions are not controlling.

III. Whether White Plains is Prohibiting or Effectively Prohibiting Telecommunications Services

Section 253(a) specifies that "[n]o State or local statute or regulation, or other State or local legal requirement, may

prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. §253(a). Courts have held that a prohibition does not need to be complete or "insurmountable" to run afoul of § 253(a). *See, e.g., RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000). Additionally, the FCC has stated that, in determining whether an ordinance has the effect of prohibiting the provision of telecommunications services, it "consider[s] whether the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Cal. Payphone Ass'n*, 12 F.C.C.R. 14191, 1997 WL 400726, at ¶ 31 (1997). We agree with these precedents.

Certain portions of White Plains's Ordinance clearly have the effect of prohibiting TCG from providing telecommunications service. In particular, the provision that gives the Common Council the right to reject any application based on any "public interest factors . . . that are deemed pertinent by the City" amounts to a right to prohibit providing telecommunications services, albeit one that can be waived by the City. *See* Ordinance, § 2.7-01(vii). Similarly, the extensive delays in processing TCG's request for a franchise have prohibited TCG from providing service for the duration of the delays. In light of the obstacles that the Ordinance poses to TCG's ability to compete in White Plains on a fair basis, we conclude that the Ordinance violates § 253(a).

While we conclude that the Ordinance as a whole violates § 253(a), we must nevertheless analyze whether portions of the Ordinance and of the August Proposal are saved by §253(c). This analysis is required because applying § 253(c) to the Ordinance as a whole without considering

individual provisions could result in an improper infringement of the City's legitimate interests in regulating the uses of the public rights-of-way. Conversely, applying § 253(a) to individual provisions without considering the Ordinance as a whole would neglect the possibility that a town could effectively prohibit telecommunications services through a combination of individually non-objectionable provisions. We note that the district court applied this methodology and neither party objected.

IV. The August Proposal's Gross Revenue Fee

The most significant provision of the August Proposal is the requirement that TCG pay five percent of its annual gross revenues from White Plains business to the City. *See* August Proposal, § 8-1(a). Section 253(c) provides:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

47 U.S.C. § 253(c). In order for the fee to fall within this savings clause, the fee must constitute "fair and reasonable compensation" and must be applied "on a nondiscriminatory basis." We consider these issues separately with respect to the five-percent gross revenue fee White Plains is charging TCG.

A. "Fair and reasonable compensation"

The statute does not define the scope of "fair and reasonable compensation." The core issue is whether to be "fair

and reasonable" such "compensation" is limited to cost recovery, as TCG argues, or whether it also extends to a reasonable rent, as White Plains contends.

The statutory language is not dispositive. As ordinarily understood, "compensation" often extends to more than costs. Thus, when we discuss wages and salary as "compensation," *see, e.g.*, I.R.C. § 61(a)(1), the term is not limited to costs. Similarly, discussing the payment of rent as "compensation" for the use of property does not strain the ordinary meanings of any of the words. And commercial rental agreements commonly use gross revenue fees as part of the price term. However, "compensation" is also sometimes used as a synonym for costs. As an example, "compensatory" damages in tort are designed to precisely offset the costs, both financial and otherwise, inflicted by the tort. Terms like compensation are flexible, taking on different meanings depending on the contexts in which they are used. Even "costs," a seemingly more concrete term that TCG argues is synonymous with "compensation" in this context, can refer either to the actual out-of-pocket expenses incurred or more broadly to the costs of capital and the "opportunity cost" of forgone alternative uses of resources. *See Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646, 1666 n.17 (2002). Thus, although Congress's choice of the term "compensation" may suggest that gross revenue fees are permissible, this hardly decides the issue.

The two other circuits that have addressed the question have split. The Sixth Circuit has upheld a four-percent gross revenue fee. *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624-25 (6th Cir. 2000). The court employed a "totality of the circumstances" examination and concluded that the fee was "fair and reasonable" in light of the amount of use contemplated, the amount other providers were willing to pay, and the fact that TCG had agreed in prior negotiations

to an almost identical fee. *Id.* at 625. The court also noted that § 253's "fair and reasonable" compensation requirement is different from the Pole Attachment Act's requirement that rates be "just and reasonable", 47 U.S.C. § 224, which is defined in terms of recovery of additional costs, and that "compensation" is different from costs. *Id.* at 625.

Conversely, the Ninth Circuit declared in passing that "non-cost-based fees" are "objectionable," but only after concluding that other, non-severable aspects of the local ordinances at issue required preemption. *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1179 & n.19 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 309 (2002). Thus, the Ninth Circuit's statement about "non-cost-based fees" could be described as dicta.

TCG premises its argument that "fair and reasonable compensation" should be limited to costs and should exclude gross revenue fees on a collection of since-repudiated dormant Commerce Clause cases. *See, e.g., Atl. & Pac. Tel. Co. v. City of Philadelphia*, 190 U.S. 160,162 (1903). TCG argues that in those cases the Supreme Court described reasonable compensation as limited to the recovery of costs, and that, despite the subsequent overruling of that line of cases, Congress should be assumed to have intended the same meaning of "reasonable." The dormant Commerce Clause cases at issue, which dealt with restrictions on the ability of states to tax interstate commerce, were overruled in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274,277, 288-89 (1977). TCG relies on *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355 (1994), for the principle that Commerce Clause precedent that has been overruled nevertheless can be used to determine whether a fee is reasonable. *Northwest Airlines* concerned the Anti-Head Tax Act, 49 U.S.C. App. §1513, which forbids certain taxes in the operation of airports, but allows "reasonable rental

charges, landing fees, and other service charges." 49 U.S.C. § 4011b(e) (formerly 49 U.S.C. App. §1513(b)); *see Northwest Airlines*, 510 U.S. at 363. In construing "reasonable rental charges," the Supreme Court relied on superseded dormant Commerce Clause precedent concerning what airport fees were reasonable. *Id.* at 367-69. However, the circumstances of *Northwest Airlines* were dramatically different from the present case. *Northwest Airlines* interpreted the statute, which had been enacted to displace prior caselaw, *see id.* at 368, in light of the way that terms were used in the caselaw it displaced. In contrast, TCG asks this court to interpret the 1996 Act in light of the way terms were used in a series of unrelated cases that were overruled by the Supreme Court in 1977. Expecting Congress to be aware of how courts interpreted words in an area of law at the time that a statute was enacted to modify that law is different from assuming that Congress intended words to be interpreted in the same way they were interpreted in unrelated caselaw that had become obsolete nearly twenty years earlier.

Additionally, the policies underlying § 253(c)'s safe harbor for "fair and reasonable compensation" are significantly different from the reasons that the dormant Commerce Clause was held to restrict fees to reasonable, cost-based exactions. Section 253(c) requires compensation to be reasonable essentially to prevent monopolistic pricing by towns. Without access to local government rights-of-way, provision of telecommunications service using land lines is generally infeasible, creating the danger that local governments will exact artificially high rates. In contrast, the dormant Commerce Clause cases relied on by TCG required that rates be reasonable to ensure that they were not disguised taxes. Section 253 is not targeted at disguised taxes.

However, because the issues of whether "reasonable compensation" can include gross revenue fees and, if so, what percentage of gross revenue may be exacted are difficult and not necessary to resolve this appeal in light of the discussion which follows, we decline to reach the issue.

B. "Competitively neutral and nondiscriminatory"

White Plains does not require Verizon to comply with the terms of the Ordinance and has not required Verizon to enter into a franchise agreement comparable to the August Proposal. The City argues, and the district court agreed, that the differential treatment is "competitively neutral and nondiscriminatory," as § 253(c) requires, because of the long history of services provided to White Plains by Verizon and because Verizon provides certain in-kind compensations to the City such as free conduit space. We disagree.

Contrary to the district court's holding, the disparate treatment is plainly not "competitively neutral and nondiscriminatory." From an economics perspective, whether fees are competitively neutral should be determined based on future costs of providing services, not sunk costs incurred in the past, because that is the playing field on which the competition will take place. *Cf. Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646, 1653-54 (2002) (upholding FCC regulation linking "just and reasonable" rates only to forward-looking costs). Verizon's costs in providing conduits to White Plains are sunk costs; they do not affect the cost to Verizon of offering services in the future. Furthermore, Verizon was compensated for those sunk costs by receiving a monopoly on phone service within White Plains under the old system and would normally be expected to have included those costs in its rate base. If TCG is required to pay five percent of its gross revenues to the City and Verizon is not, competitive neutrality is

undermined. Verizon will have the advantage of choosing to either undercut TCG's prices or to improve its profit margin relative to TCG's profit margin. Allowing White Plains to strengthen the competitive position of the incumbent service provider would run directly contrary to the pro-competitive goals of the TCA. *See* Preamble, 104 P.L. 104, 110 Stat. 56.

The Sixth Circuit reached a different conclusion in *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624-25 (6th Cir. 2000). The *TCG Detroit* situation is not precisely analogous to the White Plains plan, however, because there the City of Dearborn attempted to require Ameritech, the incumbent service provider, to pay the same fee that it charged TCG. The attempt to charge Ameritech a franchise fee was invalidated on Michigan state law grounds. *Id.* at 625-26. In contrast, here White Plains has not attempted to charge Verizon the fee that it seeks to charge TCG. Thus, to the extent that *TCG Detroit* turned on Dearborn's attempts to treat both service providers equivalently, it is simply not applicable to this case. But because the Sixth Circuit allowed Dearborn to give the advantage to the incumbent after those attempts failed, we think *TCG Detroit* was wrongly decided.

The Sixth Circuit concluded that because Dearborn sought to treat TCG and Ameritech equally but was precluded from doing so by state law, it did not violate the provisions of § 253. However, § 253 does not limit municipalities to charging fees that are "competitively neutral" to the extent permitted by state law; it forbids fees that are not competitively neutral, period, without regard to the municipality's intent. Where state laws and local ordinances combine to create a fee that is not "competitively neutral," § 253 preempts the local ordinance, even if it would have been permissible absent the state law. Moreover, the Sixth Circuit's statement that TCG failed to show that

Ameritech was undercutting its competitors and creating a barrier to entry misses the point that fees that exempt one competitor are inherently not "competitively neutral," regardless of how that competitor uses its resulting market advantage.

The requirements of § 253 are not inflexible, however. The statute does not require precise parity of treatment. An earlier draft of the bill that ultimately became § 253 included a provision that would have forbidden local governments from imposing any fee that "distinguishes between or among providers of telecommunications services." H.R. 1555, 104th Cong. § 243(e) (1995). Both the elimination of that provision and the language of the enacted version of § 253 strongly support the conclusion that franchise fees need not be equal. Municipalities can take into account different costs incurred by different uses of the rights-of-way. They can also consider the scale of the use of rights-of-way. They also retain the flexibility to adopt mutually beneficial agreements for in-kind compensation. Neutrally applied most-favored-vendee provisions that require service providers to offer their best rates to the city or requirements that service providers allow the city free use of conduit space or similar treatment are at least potentially permissible. A city can negotiate different agreements with different service providers; thus, a city could enter into competitively neutral agreements where one service provider would provide the city with below-market-rate telecommunications services and another service provider would have to pay a larger franchise fee, provided the effect is a rough parity between competitors.

But a municipality may not, as White Plains sought to do, impose a host of compensatory provisions on one service provider without placing any on another. The City tried to exact a variety of forms of compensation from TCG, while not exacting any compensation from Verizon on a forward-

looking basis. The only compensation that Verizon has provided White Plains was the use of free conduit space, provided in the past in exchange for a complete monopoly at that time. Verizon has already reaped the benefit of those bargains. Moreover, TCG is required to provide the city with conduit space in conduits it builds. In order for the City to demand fees, most-favored-vendee status, or similar benefits from TCG, it must demand comparable benefits from Verizon, taking into account relevant differences in scale of operations and costs incurred. While municipalities may be flexible, the compensation they exact must be "competitively neutral and nondiscriminatory."

We thus hold that the five-percent gross revenue fee provisions of the August Proposal, at sections 8.1-8.4, 8.6, are not saved by § 253(c) and reverse the district court. The provisions intended to ensure payment of the fee, most notably sections 8.5 and 16 of the August Proposal, which required that financial records be available for examination and that TCG's parent guarantee payment, are rendered moot by the invalidation of the fee itself.

We affirm the district court's invalidation of the most-favored-vendee clause. *See* August Proposal, § 2.7. Although we take no position on whether section 2.7 should be construed as impermissible rate regulation, as the district court concluded, or as a form of compensation for use of the rights-of-way, in which case it is not competitively neutral because Verizon is not required to provide any compensation to the City, we conclude that the provision violates § 253.

V. Non-fee Related Provisions

We next turn to the aspects of the City's plan that do not involve fees. Here, the question is whether the regulations are designed to "manage the public rights-of-way," as

permitted by § 253(c), or impermissibly go further. § 253(c). We first consider the portions of the Ordinance invalidated by the district court. Two provisions that required TCG to maintain records and to allow the City to inspect its records and facilities were narrowed by the district court to apply only to the extent necessary to manage the rights-of-way. *See* Ordinance, §§ 2-9-01(vi) and (viii). White Plains does not appeal the limiting construction placed on these provisions.

The district court struck down a variety of provisions in the Ordinance as not directly related to the management of the rights-of-way. Thus, the district court invalidated subsections 2-3-02(ii), (vi), and (vii) of the Ordinance, which required disclosures to be made about the telecommunications services to be provided, the sources of financing for the telecommunications services, and the qualifications to receive a franchise. Similarly, the district court struck down subsections 2-7-01(ii) and 2-9-01(ii), both of which required consideration of the information required by subections 2-3-02(ii), (vi), and (vii). Subsections 2-7-01(vi), (vii), and 2-9-01(xvii) were invalidated for allowing and requiring the White Plains Common Council to consider other factors related to the public interest in deciding whether to grant a franchise.

All of the Ordinance sections struck by the district court were properly invalidated. The disclosures mandated by the invalidated provisions were relevant only for regulating telecommunications, which § 253 does not permit White Plains to do, not for regulating use of the rights-of-way, which White Plains may do. *See City of Auburn*, 260 F.3d at 1177-78. Because the required information was not relevant to the permissible franchising process, subsections 2-7-01(ii) and 2-9-01(ii) likewise fall. Finally, the Ordinance's provisions allowing the White Plains Common Council to

consider any factor deemed to be in the public interest provides precisely the sort of discretion to prohibit telecommunications services that § 253 preempts. *See City of Auburn*, 260 F.3d at 1179.

The district court's invalidation of various portions of the August Proposal was similarly correct. Sections 11.9(d) and 12.3 require prior approval of the locations of TCG's network. Although a similar requirement might be permissible if it were limited to public land, the sections as written restrict TCG's ability to develop a network even on private property and are, therefore, invalid. The district court also invalidated the record-keeping provisions of Sections 12.1 and 12.2; White Plains does not challenge this decision of the district court.

The district court also correctly invalidated sections 3.1(4) and 13.6 of the August Proposal, both of which purport to waive TCG's right to challenge illegal provisions of the franchise in court. Requiring telecommunications providers to agree to not challenge the provisions of the franchise in court is a transparent attempt to circumvent § 253. The TCA does not create a collection of default rules that municipalities and service providers can contract around. The provision would have been completely unenforceable had TCG agreed to it, but it was improper for White Plains to even propose it.

Finally, we turn to the restrictions the Ordinance and August Proposal place on transferring a franchise. *See* Ordinance, §2-9-01(xii); August Proposal, §14. The district court upheld the Ordinance's provision and by extension the August Proposal's implementation of this restriction, but we reverse. The Ninth Circuit has invalidated similar provisions, holding that they went "far beyond" regulating the use of rights-of-way. *City of Auburn*, 260 F.3d 1160,

1178 and n.15. A more limited franchise transfer provision could be reasonably related to regulating the use of the rights-of-way. For example, a transfer limitation, if applied neutrally to all franchisees, might permit rejection of a transferee on the basis of insufficient assurance of ability to pay reasonably imposed fees for use of rights-of-way. However, because White Plains cannot legitimately turn away "any" provider of telecommunications services, § 253(a), a provision of sweeping breadth whose main purpose is to force each new telecommunications provider to receive White Plains's blessing before offering services, even if its services represent no change from the services offered and burdens imposed by a prior franchisee, is invalid. Because of the unfettered breadth of the provision, it cannot stand.

To summarize, we invalidate as contrary to § 253(a) and not saved by § 253(c) the following provisions of the Ordinance: Sections 2-3-02(ii), (vi), and (vii), 2-7-01(ii), (vi), (vii), and 2-9-01(ii), (xii), and (xvii) and August Proposal Sections 2.7, 3.1(4), 8, 11.9(d), 12.1, 12.2, 12.3, 13.6, and 14. August Proposal Section 16 is rendered moot by the invalidation of the five-percent gross revenue fee.

CONCLUSION

We affirm in part and reverse in part. Costs are awarded to TCG.

United States District Court,
S.D. New York.

TCG NEW YORK, INC., TC Systems, Inc.,
and Teleport Communications d/b/a
TCNY, Plaintiffs,
v.
CITY OF WHITE PLAINS,
NEW YORK, Defendant.

No. 99CIV.4419(BDP).

Dec. 20, 2000.

MEMORANDUM DECISION AND ORDER

BARRINGTON D. PARKER, Jr., District Judge.

Plaintiffs TCG New York, Inc., TC Systems, Inc. and Teleport Communications d/b/a TCNY (collectively, "TCG" or "Plaintiffs") commenced this action against the City of White Plains (the "City" or "Defendant"), alleging violations of § 253 of the Telecommunications Act of 1996, 47 U.S.C. § 253 (the "TCA"), the Fourteenth Amendment of the United States Constitution and New York state law. The case was tried to the Court on a statement of stipulated facts (the "Stipulated Facts"). This Court's decision, based on those facts, follows.

BACKGROUND

Plaintiffs are all wholly-owned subsidiaries of Teleport Communications Group, a subsidiary of AT & T Corporation, and are in the business of providing telephone and telecommunications services. Plaintiff TC Systems, Inc.

is organized to construct, own, use and maintain lines for telephone purposes within the State of New York under the New York Transportation Corporations Law. *See* N.Y. Transp. Corp. Law § § 2, 25. Plaintiffs have been issued certificates of public convenience and necessity by the New York Public Service Commission ("PSC") for the provision of public telephone service in the State of New York. *See* N.Y. Pub. Serv. Law § 99.

The City is a municipal corporation and a political subdivision of the State of New York. Plaintiffs have sought the City's approval to construct telecommunications facilities and place other equipment in the City's rights- of-way, in particular new conduit networks as well as a fiber optic network of cables to run through new and preexisting conduits in the City.

I. The City Ordinance

On December 1, 1997, in response to Congress' enactment of the TCA in 1996, the City passed an ordinance setting forth the process by which new telecommunications carriers could obtain approval to place equipment in the City's rights-of-way (the "Ordinance"). *See* White Plains Municipal Code, Telecommunications Franchising and Licensing, Articles 1--3.

The Ordinance requires that a carrier submit a formal application to the Commissioner of Public Works and the Office of Corporation Counsel which must include, *inter alia,* information regarding the carrier, its affiliates, the equipment to be placed in the rights-of-way, the carrier's construction plans, its legal, financial, technical and other appropriate qualifications, and the financing for the proposed construction. *See* Ordinance § § 2-3-01 & 02.

After the application is complete, the Ordinance requires that the carrier obtain a "franchise," or, in the case of carriers seeking only a limited use of the rights-of-way (e.g., installing less than 2500 feet of cable), a "revocable license." *See* Ordinance § 2-1. The parties are required to negotiate the terms of the franchise agreement or the revocable license, including compensation to the City, insurance, performance bonds, the City's right to inspect the premises, indemnification requirements, non-assignment clauses and other provisions. *See* Ordinance § § 2-6, 2-9.

Once the carrier and City reach an agreement, the application is referred to the Common Council, which may reject the application or adopt it by a separate ordinance. *See* Ordinance § 2-1-04. In its review, the Common Council may consider a number of factors, including, *inter alia,* the carrier's ability to satisfy construction requirements and to maintain the City in good condition, the adequacy of the terms of the franchise agreement or license, the adequacy of the compensation to the City, legal, financial, technical and other qualifications of the carrier and any other factors as Council deems appropriate and in the public interest of the City. *See* Ordinance § 2-7.

II. Negotiation of the Franchise Agreement

The parties have had numerous discussions since early 1992 regarding the possible use of the City's rights-of-way in connection with TCG's plan to construct telecommunications facilities. TCG formally applied in 1992 and 1994, regularly communicating with City representatives in an attempt to obtain the City's consent.[1]

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[1] To date, no decision has been rendered by the City concerning the 1992 and 1994 applications, as they are presumably considered moot by the actions that followed.

In April 1998--following the enactment of the Ordinance--TCG filed a formal application with the City for a revocable licence to install a relatively small amount of fiber optic cable and about 240 feet of underground conduit. Soon thereafter, TCG requested a full-blown franchise,and made a formal application for a franchise in February 1999.

Since TCG's request, the parties have engaged in vigorous negotiations, particularly over a May 1999 draft of the proposed franchise agreement, the terms of which were substantially based upon a "Model Franchise" which the City seeks to impose on all prospective telecommunications providers.[2] When it was clear that agreement could not be reached on the terms of that proposal, TCG filed this lawsuit on June 18, 1999, alleging violations of federal, state and constitutional law.

After the initiation of this lawsuit, the parties attempted to resolve their differences, and their negotiations resulted in an offer by the City of a new proposed franchise agreement (the "August Proposal") which sought to address some, but not all, of TCG's objections. As a result of further negotiations, the City offered additional modifications to the August Proposal, which were not sufficient to satisfy TCG.[3]

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[2] The City has previously come to terms with Brooks Fiber (a subsidiary of MCI Worldcom, Inc.), Northeast Networks, Inc. and Metromedia Fiber Network Services, Inc., who have each agreed to essentially the same terms in the Model Franchise, as well as Qwest Communications Corp. and Northeast Optice Network, Inc., who have been granted revocable licenses.

[3] There appears to be some confusion between the parties concerning the latest version of the franchise agreement.

The City's August Proposal would, *inter alia*, require TCG to pay an annual franchise fee to the City equal to five percent of gross revenues, require a guarantee of payment from its parent corporation, and would require that TCG build a limited amount of additional conduit without charge at the City's request. In addition, the August Proposal would reserve the right of the City to examine TCG's records, impose a most favored vendees status on behalf of the City, and mandate that upon termination of the agreement, TCG would be required to remove its facilities from public property at its own expense.

III. Treatment of Bell Atlantic

The current incumbent local exchange telephone

While plaintiffs refer in their trial papers only to the provisions of the May 4th proposal, both parties have acknowledged--in the Stipulated Facts--that the August Proposal was, indeed, delivered to and received by TCG in the summer of 1999. The August Proposal, as well as subsequent modifications made thereto, renders some of the provisions TCG complains of moot, including, *inter alia*, the "most favored nations" clause (§ 2.2 in the May draft), the requirement that title to TCG's facilities pass to the City upon termination of the franchise (§ § 4.3, 4.5 and 4.6 in the May draft), the requirement that TCG pay a fee if it wishes to transfer the franchise (§ 15.2 in the May draft), the requirement that TCG submit annual financial reports and other reports (§ § 9.5, 13.4--13.6 in the May draft) and the provision stating that TCG would comply with the agreement and pay the franchise fee even if it were deemed illegal (§ 9.1(b) in the May draft). For purposes of this opinion, the Court assumes that the August Proposal, including its modifications, is the relevant version in dispute.

carrier in the City is Bell Atlantic (and its predecessors-in-interest, NYNEX and New York Telephone). The City has had arrangements and understandings with Bell Atlantic since as far back as 1919, at which time Bell Atlantic agreed to provide the City with free conduit for certain municipal uses. Throughout the years, a symbiotic relationship existed between Bell Atlantic and the City, whereby Bell Atlantic would provide free conduit space in exchange for permission to use the City's public rights-of-way. Since 1954, Bell Atlantic has constructed an extensive underground conduit network in the downtown area of the City, which is more extensive than the underground facilities constructed by, or proposed to be constructed by, any other telecommunications provider in the City, including TCG. Of the thirty-one mile network of fiber optic cable and copper wire that make up the City's own network, twenty miles are in conduit owned by the City on aerial poles owned by Bell Atlantic and ConEd. The other eleven miles are run through underground conduit provided by Bell Atlantic at no cost to the City.

Consequently, Bell Atlantic is not subject to the regulations set forth in the Ordinance, and is not required to obtain, and does not have, a franchise agreement with the City. Unlike new providers of telecommunications services in the City, Bell Atlantic does not pay a franchise fee, is not subject to the same general construction permitting requirements, and is free from requirements for insurance, deposits and permitting fees.

IV. TCG's Claims

TCG objects to the requirements that the City seeks to impose on several grounds. First, plaintiffs claim that provisions of the Ordinance and the August Proposal effectively prohibit TCG from providing telecommunications services, and regulate beyond the City's public rights-of-way,

violating § 253(a), (b) and (c) of the TCA (Claims 1--4, 6--8, 11 and 12 of the Complaint). Second, TCG complains that Bell Atlantic's *de facto* exemption from the Ordinance, and from having to enter into a franchise agreement, is both non-competitive and discriminatory against TCG, in violation of § 253(c) of the TCA (Claim 5). Third, TCG claims that the Ordinance and the August Proposal violate the New York Transportation Corporations Law and the New York Public Service Law (Claims 9--12). Finally, TCG contends that the City has denied plaintiffs' due process rights under the Fourteenth Amendment (Claim 13).

DISCUSSION

I. The Telecommunications Act of 1996

The gravamen of plaintiffs' complaint is that the City's regulations set forth in the Ordinance and the August Proposal are preempted under § 253 of the TCA. Accordingly, a brief look at the history and structure of the TCA is helpful.

By adopting the TCA in 1996, Congress "fundamentally restructure[d] local telephone markets" by prohibiting states and local governments from "enforc [ing] laws that impede competition." *AT & T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 371, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). For nearly a century, the rationale behind the regulation of the telecommunications industry presumed that telephone monopolies would best provide reliable and universal service. *See Cablevision of Boston, Inc. v. Public Improvement Commission of the City of Boston,* 184 F.3d 88, 97 (1st Cir.1999). The promulgation of the TCA, however, signaled the abandonment of that regulatory philosophy, as the federal statute now "requires [incumbent carriers] to provide other participants in the

telecommunications market with competitive access to their networks and services." *Id.* As a result, competitive local exchange carriers, or CLECs, may now offer service in competition with incumbent local exchange carriers, or ILECs. *See Id.* at 271-73.

At the heart of the present dispute is the meaning and structure of § 253 of the TCA. That section, entitled "Removal of Barriers to Entry," states, in relevant part:

> (a) In general--No state or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
> (b) State regulatory authority--Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
> (c) State and local government authority--Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

The structure and language of § 253 embodies the balance between Congress' "new free market vision" and its recognition of the "continuing need for state and local governments to regulate telecommunications providers on grounds such as consumer protection and public safety." *Cablevision,* 184 F.3d at 98. Under § 253(a), state or local

regulations may not prohibit or have the effect of prohibiting telecommunications services--if so, then the relevant regulations are preempted by that provision, unless they can come under the safe harbors set forth in § 253(b) or (c). *See Cablevision,* 184 F.3d at 98 (calling § 253(b) and (c) "safe harbors" to the prohibition of § 253(a)); *Sprint Spectrum L.P. v. Mills,* 65 F.Supp.2d 148, 159 (S.D.N.Y.1999) ("Section 253 preempts all state and local regulations that prohibit or have the effect of prohibiting any company's ability to provide telecommunications services, unless such regulations fall within either of the statute's two "safe harbor" provisions.") (internal quotations and citations omitted); *AT & T Communications of the Southwest, Inc. v. City of Dallas,* 8 F.Supp.2d 582, 587 (N.D.Tex.1998) (same).

§ 253(b) preserves the ability of a state to regulate telecommunications on the basis of the "public good." "Requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers" are permissible so long as they are imposed on a competitively neutral basis. 47 U.S.C. § 253(b). Conjointly, § 253(c) reserves the authority of state and local governments to regulate the public rights-of-way, as well as their right to charge "fair and reasonable compensation," so long as they are conducted on a competitively neutral and nondiscriminatory basis. 47 U.S.C. § 253(c).

Plaintiffs contend that the City has violated § 253(b) by regulating "public good" issues in the Ordinance and the August Proposal. However, that sub-section only preserves certain state activities, and does not speak to local regulation. *See Southwestern Bell Wireless, Inc. v. Johnson County Board of County Commissioners,* 199 F.3d 1185, 1192 (10th

Cir.1999) ("section 253(b) applies only to state, not local, regulation"); *City of Dallas v. Metropolitan Fiber Systems of Dallas, Inc.*, 98 civ. 2128, 2000 WL 198104, at * 4 (N.D.Tex. Feb.17, 2000) (agreeing that § 253(b) was not applicable to municipalities). To the extent TCG complains of local regulation, it should rely upon § 253(c). Therefore, as an initial matter, this Court dismisses plaintiff's claims based upon § 253(b) (Claims 6 and 8).[4]

Accordingly, the question of whether the City's actions violate § 253 of the TCA involves a two-step analysis: (i) whether the City's regulations "prohibit or have the effect of prohibiting" the ability of TCG to provide telecommunications services under § 253(a), and (ii) if so, whether they are "saved" under § 253(c).

A. "Prohibit or Have the Effect of Prohibiting" under § 253(a) of the TCA

The parties fundamentally disagree over the scope of § 253(a); namely, the degree to which local actions are preempted under that section. Plaintiffs argue, citing, *inter alia, City of Dallas,* 8 F.Supp.2d at 591, *BellSouth v. City of Coral Springs,* 42 F.Supp.2d 1304, 1307 (S.D.Fla.1999) and *Bellsouth Telecommunications, Inc. v. Town of Palm Beach,* 127 F.Supp.2d 1348, 1352 (S.D.Fla.1999), that § 253(a) broadly preempts action by local municipalities, suggesting that only the narrow range of activities presented in § 253(c) are permissible. Under TCG's reading of the TCA, virtually all local action is preempted, unless, of course, it purports to manage rights-of- way on a non-discriminatory and competitively neutral basis under § 253(c).

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[4] In any event, TCG does not seek to take advantage of the § 253(b) safe harbor.

However, defendant argues, citing legislative history and *In re TCI Cablevision of Oakland County, Inc.*, Memorandum Opinion and Order, 1997 WL 580831, 12 F.C.C.R. 21396, at ¶ 101 (F.C.C. Sept.19, 1997), for a narrower approach. The City contends that § 253(a) only preempts local action that actually prohibits a carrier from providing telecommunications services. Because nothing in the Ordinance or the City's treatment of TCG explicitly prevented TCG from providing telecommunications services in the City, the City argues that there is no violation of § 253(a). Accordingly, the question of whether local action manages the public rights-of-way under § 253(c), the City argues, does not arise since such action is not prohibitory under § 253(a). *See In re TCI Cablevision,* 12 F.C.C.R. 21396, at ¶ 101 ("Parties seeking preemption of a local legal requirement ... must supply ... credible and probative evidence that the challenged requirement falls within the proscription of section 253(a) without meeting the requirements of ¶ 253(b) and/or (c).").

Neither argument is completely compelling. On the one hand, the parameters of what is considered prohibitory under § 253(a) are not likely to be so broad as to preempt any and all local action. Congress could have achieved that result by simply preempting all local action in § 253(a) rather than specifically dealing only with actions which "prohibit or [have] the effect of prohibiting" telecommunications services.*See* 47 U.S.C. § 253(a). On the other hand, the bar set by § 253(a) cannot be so high as to permit local municipalities to frustrate Congress' intent to foster a pro-competitive environment and remove local barriers to entry for telecommunications providers simply by clever statutory drafting. *See RT Communications, Inc. v. FCC,* 201 F.3d 1264, 1268 (10th Cir.2000) (a barrier need not be "insurmountable" or complete to be considered prohibitory under § 253(a)).

The Court need not determine here, however, what the outer parameters of § 253(a) are. Instead, this Court finds only that TCG has met its burden in demonstrating that the regulations and actions of the City (described in the Stipulated Facts) violate § 253(a). *See In re Petition of the State of Minnesota,* F.C.C.R. 99-402, ¶ 11 n. 26 (F.C.C. December 20, 1999) (party seeking preemption bears the burden of proof that there was a violation of ¶ 253(a)).

In this case, the requirements imposed on TCG by the City and the Ordinance, when viewed as a whole and in context, have the effect of prohibiting the ability of TCG to provide telecommunications services. *See Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland,* 49 F.Supp.2d 805, 814 (D.Md.1999). *vacated on other grounds,* 212 F.3d 863 (4th Cir.2000) ("[A]ny process for entry that imposes burdensome requirements on telecommunications companies and vests significant discretion in local governmental decisionmakers to grant or deny permission to use the public rights-of-way" has "the effect of prohibiting" service.); *AT & T Communications of the Southwest v. City of Dallas,* 52 F.Supp.2d 763, 770 (N.D.Texas 1999) (a representation by the city that "without a new franchise ... AT & T may not offer [services]" is "sufficient proof of the requisite prohibitive effect that triggers the preemptive force of § 253(a)."); *see also AT & T Communications of the Southwest v. City of Austin,* 975 F.Supp. 928, 939 (W.D.Texas 1997) ("The threat of criminal sanctions and fines for the failure of an entity to obtain municipal consent can indubitably only be described as a prohibition.").

As an initial matter, the Ordinance prohibits a carrier from using the City's rights-of-way without first applying for and then obtaining a franchise. The Ordinance requires that every franchise must contain certain broad terms and

conditions, such as the compensation to be paid to the City, the City's right to inspect facilities and records of the franchisee, a restriction on the assignment or other transfer of the facility without prior written consent by the City, and such other provisions the City determines are necessary or appropriate "in furtherance of the public interest." *See* Ordinance § 2.9.01.

In this particular case, as well documented by the Stipulated Facts, the process of obtaining a franchise has turned into a lengthy and complex negotiation between the parties, spanning over seven years since TCG's initial request in 1992, one a half years since TCG's first request after the promulgation of the Ordinance and more than half a year since TCG's re- application in February 1999. *See City of Austin,* 975 F.Supp. at 938 ("It goes without saying that delayed entry into the local telephone service market can have profound effects on the success of [plaintiff's] venture"). Even if the parties were able to come to terms on the provisions of the franchise agreement, the Ordinance nonetheless gives the Common Council the right to reject the application based on any "public interest factors ... that are deemed pertinent by the City." Ordinance § 2-7. Once the City identifies such factors, § 2.7 starts the entire, complex process all over again. *See Prince George's County,* 49 F.Supp.2d at 814.

Accordingly, while the City's requirements admittedly do not impose an explicit prohibition on TCG, the regulations coupled with the City's long delay in moving forward with the approval process have effectively prohibited TCG from providing telecommunications services in White Plains. *See RT Communications, Inc. v. FCC,* 201 F.3d 1264, 1268 (10th Cir.2000) ("the extent to which the [local] statute is a complete bar is irrelevant. Nowhere does the [TCA] require that a bar to entry be insurmountable

before the FCC must preempt it."). As a result, § 253(a) has been violated.

B. Are the City's Regulations Saved by § 253(c)?

A finding that local regulations violate § 253(a) of the TCA is not fatal so long as the defendant can show that those regulations satisfy the safe harbor provisions set forth in § 253(c). [FN5][5] To determine whether § 253(c) is satisfied here, three questions must be addressed. First, do the City's regulations "manage the public rights-of-way"? Second, are the required fees "fair and reasonable compensation" for the use of the public rights-of- way? And third, is the exemption of Bell Atlantic from the City's regulations competitively neutral and nondiscriminatory?[6]

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[5] Once the party seeking preemption sustains its burden to show that a local municipality has violated § 253(a) by prohibiting or effectively prohibiting service, the burden of proving that a statute or regulation comes within the safe harbor in § 253(c) falls on the party claiming that the safe harbor applies--in this case, the City. *See In re Petition of the State of Minnesota,* F.C.C.R. 99-402, at ¶ 11 n. 26 (citing *In re the Public Utility Commission of Texas,* 13 F.C.C.R. 3460, ¶ 83 (F.C.C.1997)).

[6] The issue of whether § 253(c) imposes separate restrictions against local regulations apart from the restriction against government prohibition under § 253(a), and, hence, whether an implied cause of action exists under § 253(c), is an open one. *See Cablevision,* 184 F.3d at 98, 99; *Omnipoint Communications, Inc. v. The Port Authority of New York and New Jersey,* 1999 WL 494120, at *6 n. 5 (S.D.N.Y. July 13, 1999) ("it is not clear that Section 253(c) provides plaintiff with a private cause of action. No private cause of action is expressly provided, and courts have split over whether one is implied. The Second Circuit has not yet considered this

1. *Do the Regulations Manage the Public Rights-of-way?*

§ 253(c) preserves the authority of local governments to manage the public rights- of-way. A growing number of district courts that have reviewed this issue have relied upon the Federal Communications Commission (the "FCC"), the agency charged with interpreting and enforcing the TCA, for guidance. *See e.g., Omnipoint Communications, Inc. v. The Port Authority of New York and New Jersey,* 1999 WL 494120, at *10-11 (S.D.N.Y. July 13, 1999); *PECO v. Township of Haverford,* 1999 WL 1240941, *4-6, 1999 U.S. Dist. LEXIS, 19409, at 15-19; *Town of Palm Beach,* 127 F.Supp.2d at 1352-53; *City of Coral Springs,* 42 F.Supp.2d at 1308; *Prince George's County,* 49 F.Supp.2d at 815; *City of Dallas,* 8 F.Supp.2d at 591-92.

In *In re Classic Telephone, Inc.,* 11 F.C.C.R. 13082 (F.C.C.1996), the FCC quoted from the comments of Senator Diane Feinstein in the Congressional Record, citing examples of the kinds of regulations Congress intended to permit under ¶ 253(c):

-- "regulat[ing] the time or location of excavation to

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issue.") (internal citations omitted); Compare *GST Tucson Lightwave, Inc. v. City of Tucson,* 950 F.Supp. 968 (D.Ariz.1996) (finding no private right of action); with *TCG Detroit v. City of Dearborn,* 977 F.Supp. 836 (E.D.Mich.1997), affirmed, 206 F.3d 618 (6th Cir.2000)(finding a private right of action). In any event, since this Court has held that § 253(a) was violated, § 253(c) is automatically triggered, and the Court need not decide that open issue here.

preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts"

-- "requir[ing] a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies"

-- "requir[ing] a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavations"

-- "enforc[ing] local zoning regulations" [and]

-- "requir[ing] a company to indemnify the City against any claims of injury arising from the company's excavation."

Id. ¶ 39 (citations omitted).

These categories of activities were expanded in *In re TCI Cablevision,* 1997 WL 580831, 12 F.C.C.R. 21396, at ¶ 101, where the FCC stated:

> Local governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way.... [T]ypes of activities that fall within the sphere of appropriate rights-of-way management ... include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.

Id., 1997 WL 580831, 12 F.C.C.R. 21396, at ¶ 103. There, the FCC expressed concern over a "third tier" of regulation by some localities that appear to "reach[ ] beyond traditional rights-of-way matters," including most favored nation requirements and mandating that franchisees interconnect

with other telecommunications systems for furtherance of universal service. *Id.*, 1997 WL 580831, 12 F.C.C.R. 21396, at ¶ 105. Accordingly, any attempt to regulate beyond the circumscribed scope of activities related to public rights- of-way is beyond the scope of ¶ 253(c).

a. *The Ordinance*

The Ordinance sets forth a three-part process for obtaining local approval. First, the applicant must complete a pre-franchise application to the Commissioner of Public Works and the Office of Corporation Counsel. *See* § § 2- 3-02(i)--(viii). Second, the applicant and City must then negotiate over the specific terms required to be included in the franchise agreement. *See* § § 2.9.01(i)--(xvii). And third, once it has been fully negotiated. the Common Council must review and separately approve the franchise agreement. *See* § § 2- 7-01(i)--(vii).

The pre-franchise application process seeks certain information that could easily be construed as relating to the management of the public rights-of-way, such as contact information of the applicant (§ 2-3-02(i)), a description of the proposed franchise area (§ 2-3-02(iii)), a proposed construction schedule (§ 2-3-02(iv)), a map of the proposed location of the applicant's telecommunications system (§ 2-3-02(v)), and ownership of the applicant and identification of affiliates (§ 2-3-02(viii)). These provisions "relate directly to the construction of a telecommunications facility, and seeks descriptions of how the new facility fits into the affected rights-of- way." *City of Coral Springs,* 42 F.Supp.2d at 1310.

However, the parties have conceded that § 2-03-02(ii), which requires a description of the telecommunications services to be provided, does not

directly relate to the management of the City's rights-of-way. *See* Stipulated Facts ¶ 43. This Court agrees, and, accordingly, § 2-03-02(ii) violates § 253(c) and is preempted by the TCA.[7] *See City of Coral Springs,* 42 F.Supp.2d at 1309 ("the City does not have the authority to request information regarding systems, plans, or purposes of the telecommunications facilities.").

Moreover, § § 2-3-02(vi) and (vii) require information concerning the provider's proposed financing for the operation and construction of the services to be provided, as well as a description of the applicant's legal, financial, technical and other appropriate qualifications to hold the

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[7] "The determination of whether an invalid portion of a state statute can be severed from the valid portions so that the remainder of the statute can be preserved is a question of state law." *Gary D. Peake Excavating Inc. v. Town Board of the Town of Hancock,* 93 F.3d 68, 72 (2d Cir.1996). The New York test for severability is whether the state legislature "would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether." *Greater New York Metropolitan Food Council, Inc. v. Giuliani,* 195 F.3d 100, 110 (2d Cir.1999) (internal quotations omitted). Moreover, under New York law, " 'a court should refrain from invalidating an entire statute when only portions of it are objectionable.' Although the presence of a severability clause is not dispositive, '[t]he preference for severance is particularly strong when the law contains a severability clause.' " *Gary D. Peake,* 93 F.3d at 72 (quoting *National Advertising Co. v. Town of Niagara,* 942 F.2d 145, 148 (2d Cir.1991)). Given the presence of the severability provision in the Ordinance, *see* § 3-1 of the Ordinance, and the New York standard of severability, this Court declines to invalidate the entire Ordinance, but rather just the portions of the statute it finds invalid.

franchise. Setting aside the fact that § 94 of the New York Public Service Law appears to have already delegated the authority to review these categories of information to the New York Public Service Commission ("PSC"), a number of courts have ruled that regulations requiring "the applicant [to] submit proof of its financial, technical and legal qualifications" do not regulate the public rights-of-way. *Town of Palm Beach,* 127 F.Supp.2d at 1355; *City of Dallas,* 8 F.Supp.2d at 593 ("Dallas also does not have the power to require a comprehensive application and consider such factors as the company's technical and organizational qualifications to offer telecommunications services."); *City of Coral Springs,* 42 F.Supp.2d at 1310 (striking local statute requiring that the applicant submit proof of its "financial, technical and legal qualifications"). Therefore, § § 2-3-02(vi) and (vii) are preempted by the TCA.

In connection with the requirement that a franchise agreement be negotiated, the Ordinance sets forth the terms that must be incorporated in such an agreement. *See* § 2.9.01(i)--(xvii). Aside from § 2.9.01(iii) (*see infra,* § II.B.2), the terms identified in the Ordinance, for the most part, properly address rights-of-way and related issues.

To begin with, several of § § 2.9.01's requirements deal with general unobjectionable provisions to be included in the franchise agreement--the term of the franchise (§ 2.9.01(i)), circumstances upon which the franchise may be terminated or cancelled (§ 2.9.01(iv)), and provisions to ensure that the franchisee comply with applicable laws (presumably so long as they comport with the TCA) (§ 2.9.01(x))--while certain others relate directly to the core of the City's rights-of- way authority discussed in the FCC cases above-- provisions concerning performance bonds, security, insurance and indemnification requirements (§ 2.9.01(v) and (vii)), provisions to ensure workmanship

quality and construction methods (§ 2.9.01(ix)), obligations to supply an engineering site plan (§ 2.9.01(xi)), requirement that franchisee obtain all necessary licenses (§ 2.9.01(xiv)), provisions protecting the City from property damage or interruption of operations (§ 2.9.01(xv)), and provisions designed to minimize the extent to which public use of the streets are disrupted (§ 2.9.01(xvi)). *See In re TCI Cablevision,* 1997 WL 580831, 12 F.C.C.R. 21396, at ¶ 101; *In re Classic Telephone, Inc.,* 11 F.C.C.R. 13082, at ¶ 39.

Further, § 2.9.01(xii), which restricts the assignment or transfer of the franchise without the prior consent of the City, prevents a carrier from escaping the City's rights-of-way regulation by simply having the franchise assigned to it after it was approved for another entity. § 2.9.01(xiii) relates to remedies available to the City to protect the City's interests in the event the franchisee defaults under or fails to comply with the agreement. These provisions are simply enforcement mechanisms designed to give meaning and effect to valid provisions of the franchise. *See Town of Palm Beach,* 127 F.Supp.2d at 1355 (stating that provisions "provid[ing] the mechanism for the Town to enforce [the] ordinance" was "valid in its entirety.").

However, the remaining four sub-sections in this section of the Ordinance are either invalid or potentially problematic. First, for reasons already discussed, § 2.9.01(ii), which requires information concerning the nature of the telecommunications services to be offered, does not manage the rights-of-way and is invalid. Second, § 2.9.01(xvii), which permits the City to include any provisions in the franchise which it "determines are necessary or appropriate in furtherance of the public interest," is, in this case, too overly-vague and overly-broad to be in compliance with § 253(c) of the TCA. The

discretion afforded the City in adding any provision that it considers to be in the "public interest" go well beyond the traditional scope of management of the public rights-of-way. Accordingly, the Court finds that sub-section to be preempted by the TCA because it leaves the City near total discretion to approve or reject an application.

Finally, the Court notes that § 2.9.01(vi), which relates to the City's right to inspect facilities and records of the franchisee, and § 2.9.01(viii), which requires that the franchisee maintain complete and accurate books and the City's inspection rights thereto, must be read narrowly to satisfy the requirements of § 253(c). Therefore, while the City has broad rights to negotiate provisions permitting it to inspect facilities in the rights-of-way, its rights concerning inspection of records and requiring the carrier to maintain complete and accurate records must be limited to information necessary to enforce its rights-of-way regulations and to ensure that it has received accurate fee information.

The third part of the approval process set forth in the Ordinance deals with the review by the Common Council of the franchise agreement after it has been fully negotiated. Sections 2-7-01(i)--(vii) set forth the factors that the Common Council may use in deciding whether to accept or reject a negotiated franchise.[8] Factors relating to the ability of the applicant to maintain the property of the City in good condition (§ 2-7-01(iii)), services or uses of the streets that may be precluded by the grant of the franchise, as well as any adverse impact of the proposed franchise in the efficient use of the streets (§ 2-7-01(iv)), and the willingness of the

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[8] § 2-7-01(i), which permits the Council to consider the adequacy of the proposed compensation to be paid to the City, is again set aside for a later discussion (*infra* § II.B.2).

applicant to meet construction and physical requirements and abide by all lawful conditions (§ 2-7-01(v)) fall within the City's authority to manage the public rights-of-way.

For reasons previously discussed, § 2-7-01(ii), which permits the Common Council to consider the legal, financial and technical qualifications of an applicant in deciding whether to approve the franchise, is not valid and is preempted by the TCA.

The remaining two sub-sections under § 2-7-01 are problematic as they permit approval based upon the "adequacy of the ... franchise agreement ... to protect the public interest" (§ 2-7-01(vi)), as well as "any other public interest factors or considerations ... that are deemed pertinent by the City for safeguarding the interests of the City and the public" (§ 2-7-01(vii)). These provisions give the Council nearly unfettered discretion in rejecting an otherwise proper application for a franchise. *See Prince George's County,* 49 F.Supp.2d at 816 ("most objectionable is the fact that the ordinance vests the County with complete discretion to grant or deny a franchise application based on a wide-ranging set of factors that include "whether the proposal will serve and protect the public interest." "); *PECO Energy,* 1999 WL 1240941, * 6, 1999 U.S. Dist. LEXIS 19409, at *20 ("This apparently limitless discretion of the Township Manager to grant or deny a franchise places the Ordinance outside the ambit of the TCA's safe harbor."); *City of Dallas,* 8 F.Supp.2d at 593 ("The City does not, however, have the authority to grant or deny that franchise based on its own discretion."). Accordingly, those sub-sections of the Ordinance are preempted by the TCA and are invalid.

b. *The August Proposal*

The provisions set forth in the August Proposal, and

the modifications thereto, are provisions that the City has indicated that it intends to impose onto TCG--in other words, they are provisions that TCG must accept in order to obtain a franchise. Accordingly, each of the provisions therein must comport to § 253(c), and, therefore, must also relate to the management of the City's public rights-of-way.

Against this backdrop, the Court reviews the following provisions of the August Proposal objected to by TCG in its trial brief.[9]

1. Non-exclusivity (§ 2.2): TCG's objection to this provision is not clear. To the extent it objects to the statement that the franchise is nonexclusive, plaintiffs have no valid complaint as nonexclusivity is required by the TCA. To the extent TCG complains about the wording of that provision which, under one reading, could purport to regulate telecommunications services--"[t]his franchise is a non-exclusive grant to provide Services pursuant to the terms herein"--that phrase has been replaced with clearer language in the August Proposal--"[t]his franchise is a nonexclusive grant to construct, operate and maintain the Fiber Optic Network in the Streets for the purpose of providing Services."

2. "Most favored vendees" clause (§ 2.7): Under this provision, if the City, or an elementary or secondary educational institution in the City, should contract with TCG for any of its services, TCG is required to offer them rates

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[9] As noted earlier (*supra* at note 3) certain provisions objected to by TCG are mooted by the replacement of the May 1999 draft with the August Proposal. Moreover, provisions relating to franchise fees are addressed below (*infra* § II.B.2).

and terms no less favorable than those offered to any other governmental or nonprofit agency in Westchester County. While the City innocently frames this provision as a form of "in-kind compensation," this Court finds that it is more akin to a regulation of TCG's rates, terms and conditions of service unrelated to TCG's use of the public rights-of-way, and resembles the kind of "most favored nations" clauses found to be unlawful by the FCC in *In re TCI Cablevision,* 12 F.C.C.R. 21396, at ¶ 105 (citing "most favored nations" mandates as examples of local regulation over the "rates, terms and conditions" of service that are "difficult to justify under § 253(c) on the grounds that they are within the scope of permissible local rights-of-way management authority").

3. Representation of no conflict with laws (§ 3.1(4)): Section 3.1(4) seeks to require TCG to waive its legal right, including those under the TCA, to challenge the terms or conditions of the franchise agreement. As the cases make clear, these restrictions do not relate to rights-of-way management. *See In re Classic Telephone, Inc.*, 11 F.C.C.R. 13082, at ¶ 39; *In re TCI Cablevision,* 1997 WL 580831, 12 F.C.C.R. 21396, at ¶ 101. As such, a requirement that TCG waive its legal challenges in order to obtain the City's consent to provide telecommunications services is invalid under § 253(c). However, portions of the provision relating to the legal authorization of TCG to enter into the agreement and assume the obligations thereunder are standard contractual representation and warranty provisions that do not violate § 253(c).

4. Examination of records in connection with franchise fees (§ 8.5): This provision is specifically limited to the examination of documents related to the payment of fees and therefore is necessary to accurately determine and to collect fees permitted by the TCA. *See Town of Palm Beach,* 127 F.Supp.2d at 1354.

5. Approval for location of construction (§ 11.9(d)): TCG objects to this provision requiring that the City approve the location of any part of the network prior to its construction because it may include construction performed on private, as opposed to public, property. While it may be theoretically possible for construction on private property to impact the public rights-of- way, this provision is not limited to such situations and would require approval even where the construction would have no effect whatever on public rights-of-way. Accordingly, this provision is invalid under § 253(c).

6. Examination of records (§ 12): These provisions permit the City broad rights to inspect and oversee the business of TCG, including the obligation of TCG to maintain complete and accurate books concerning its operations (§ 12.1). These provisions also grant the City the right to audit all accounting and financial records of TCG related to the fiber optic network on three days notice (§ 12.1), and require the availability of all such records at a particular location and/or upon request by the City (§ 12.2). These provisions go farther. They require annual submissions of a map setting forth the major physical elements of the network (§ 12.3), the approval of all locations of the network by the City (§ 12.3), and the submission of any financial information requested by the City concerning TCG's financial capability to comply with the agreement, as well as any information necessary to carry out the City's ability to manage the public streets (§ 12.4).

As discussed earlier, any requirement of maintenance and inspection of records must be limited to information necessary to enforce the City's rights-of-way regulations and to ensure that the City has received an accurate fee. The City's limited authority does not give it the power to

micromanage TCG's business through audits and submission of detailed financial records, unless they are directly related to the rights-of-way or a proper fee. Accordingly, § 12.1 is far too broad to satisfy § 253(c) and, for that reason, is invalid. *Prince George's County,* 49 F.Supp.2d at 810 (finding requirement invalid that company provide financial information as not relating to rights- of-way management); *City of Dallas,* 8 F.Supp.2d at 593; *City of Coral Springs,* 42 F.Supp.2d at 1310. Moreover, as § 12.2 relates to records discussed in § 12.1, it is also invalid.

While the Court finds § 12.3's requirement for a submission of an annual map generally valid as an exercise of the City's rights-of-way management, its requirement that all locations be approved by the City is invalid for the same reasons discussed above concerning § 11.9(d). Finally, because § 12.4 limits itself to information necessary to carry out the City's management of the public streets as well as TCG's ability to pay the required fee, this section is consistent with the scope of § 253(c).

Waiver to challenge terms of the franchise agreement (§ 13.6): for substantially the same reasons discussed above concerning § 3.1(4) above, this kind of requirement of waiver does not resemble the kinds of rights-of-way management contemplated by the FCC cases described above, and, accordingly, is invalid under § 253(c).[10]

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[10] TCG also asserts two additional claims under § 253(c) concerning the City's rights-of-way management. First, TCG claims that the City may not assess a franchise fee or require a franchise agreement for TCG's resale of Bell Atlantic's services since this resale does not impact the public rights-of-way (Claim 11). However, the Stipulated Facts show that TCG has been selling telecommunications services in the City on a resale basis since 1993, and has never been

2. *Are the proposed franchise fees "fair and reasonable compensation" under § 253(c)?*

The parties dispute whether the proposed fees are "fair and reasonable compensation" under § 253(c) of the TCA. The Ordinance itself provides little or no guidance on the calculation of the fees to be imposed by the City, leaving the details of the compensation to be negotiated in the franchise agreement. *See* § 2.9.01(iii) of the Ordinance. Once the franchise is fully negotiated, § 2-7-01(i) permits the Common Council to review and pass on the proposed fee. So long as the fees themselves comply with § 253(c), the Court does not view these provisions to be problematic under the TCA.

Section 8 of the August Proposal sets forth four categories of fees and costs to be paid by TCG to the City. First, § 8.1(a) imposes an annual franchise fee equal to five percent of all revenue derived by TCG or its affiliates in connection with the operation of the proposed telecommunications facilities within the City limits. Second,

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required by the City to pay a fee or enter into a franchise for such activity. *See* Stipulated Facts ¶ 16. Moreover, the City acknowledges in its trial papers that it does not now seek a fee or a franchise for such resales. As there is no controversy, Claim 11 is dismissed. Second, TCG claims that the City cannot charge a fee or require a franchise for cables TCG seeks to run through preexisting conduit owned by Bell Atlantic (Claim 12). The fact that TCG will use some preexisting conduit, however, does not affect the City's authority to manage the rights-of-way or impose a franchise fee, since cables will nevertheless be placed in the public rights-of-way. Accordingly, Claim 12 is dismissed, albeit through conduit already constructed by another party.

§ 8.1(b) imposes a minimum annual fee starting from $5,000 in the first year, gradually increasing to $10,000 after the fifteenth year. Third, § 8.1(c) requires TCG to pay for costs of third parties (including attorneys' and consultants' fees) in connection with the award of the franchise. Fourth, § 8.2 requires that TCG build one thousand feet of conduit for the City at points where its proposed network overlaps the City's network currently under construction. Moreover, the provision also requires that TCG install additional conduit for municipal purposes along the proposed network for which the City would reimburse TCG for costs of materials. The City considers the requirements set forth in § 8.2 as "in kind" compensation to be paid by TCG. In addition, § 16 of the August Proposal requires that TCG's parent guarantee TCG's obligations under the agreement.

Complicating the analysis of whether these fees are proper under § 253(c), courts are split as to the nature of the fees local municipalities may charge carriers. Some courts have concluded that to be "fair and reasonable," fees must be directly tied to the carrier's use of and/or the municipality's costs of maintaining the public rights-of-way. *See Prince George's County,* 49 F.Supp.2d at 817 (fees must be set at a level reasonably calculated to compensate municipalities for the costs of administering franchise programs and maintaining the rights-of-way); *City of Dallas,* 8 F.Supp.2d at 593 ("the City does not have the authority to impose fees on a telecommunications provider except as compensation for use of the City's rights-of-way"). Consequently, fees based on revenue or overall profits would not be "fair and reasonable compensation." This authority suggests that § 253(c) limits municipalities to the recovery of reasonable costs and does not permit cities to profit from the use of its rights-of-way by others.

However, authority from this District points in

another direction, concluding that this reading of the word "compensation" may "too severely limit the term" because such a reading would treat § 253(c) as if it permitted recoupment of "costs" rather than gaining of "compensation." *Omnipoint*, 1999 WL 494120, at *6 (citing *TCG Detroit v. City of Dearborn*, 16 F.Supp.2d 785, 789 (E.D.Mich.1998)). "Moreover, the term "compensation" has long been understood to allow local governments to charge rental fees for public property appropriated to private commercial uses. It is thus doubtful that Congress, by the use of the words "fair and reasonable compensation," limited local governments to recovering their reasonable costs."[11] *Id.*

Consequently, the *Omnipoint* court and others have been willing to permit fees based upon general revenues and other considerations not directly related to a municipality's expenses in maintaining the rights-of-way. *See TCG Detroit v. City of Dearborn*, 206 F.3d 618, 625 (6th Cir.2000) (affirming district court ruling upholding fee based on 4% of gross revenue, lump sum franchise fee, and conditional requirement that plaintiff install conduit for the city at no charge); *BellSouth Telecommunications, Inc. v. City of Orangeburg*, 337 S.C. 35, 43, 522 S.E.2d 804 (S.C.1999) (finding "franchise fee equal to a percentage of the revenue generated is not inherently unfair or unreasonable"); *Omnipoint*, 1999 WL 494120, at *6-8 (finding that local

[11] Moreover, as acknowledged by the parties in the Stipulated Facts, calculating the impact or costs of telecommunications providers on the public rights-of-way would not be a simple undertaking. *See* Stipulated Facts ¶ 45. A number of intangible factors would need to be considered, including the shortened life of pavement, added police costs to deal with traffic disruptions, interference with the City's other systems, impact on traffic, and offsetting benefits to the City from the availability of multiple telecommunications providers.

governments were not likely limited to recovering only their reasonable costs of rights-of-way). These cases have found nothing inappropriate with cities charging "rent" for the use of city-owned property for private purposes. *See Omnipoint,* 1999 WL 494120, at 6; *TCG Detroit v. City of Dearborn,* 16 F.Supp.2d 785, 789 (E.D.Mich.1998), affirmed, 206 F.3d 618, 625 (6th Cir.2000); *see also City of St. Louis v. Western Union Tel. Co.,* 148 U.S. 92, 99, 13 S.Ct. 485, 37 L.Ed. 380 (1893) ("Suppose a municipality permits one to occupy space in a public park, for the erection of a booth in which to sell fruit and other articles; who would question the right of the city to charge for the use of the ground thus occupied ... ? So, in like manner, while permission to a telegraph company to occupy the streets is not technically a lease ... it is the giving of the exclusive use of real estate, for which the giver has a right to exact compensation, which is in the nature of rental.").

The "rent" charged, however, must be "fair and reasonable." *City of Dearborn* held that this fairness determination should be made by examining the totality of the facts and circumstances in the case. *City of Dearborn,* 16 F.Supp.2d at 789, affirmed, 206 F.3d at 625. There, the district court identified four non-exclusive factors relevant to whether the fees exacted from the telecommunications provider by the city of Dearborn--fees which were substantially similar to those the City is trying to impose here--were not inappropriate: "(1) the extent to use of the public rights-of-way; (2) whether other carriers have agreed to comparable compensation (or comparable uses of public rights-of-way); (3) the course of dealings among the parties; and (4) whether the compensation sought is 'so excessive that it is likely to render doing business unprofitable.' " *Omnipoint,* 1999 WL 494120, at 7 (citing *City of Dearborn,* 16 F.Supp.2d at 790-91).

Applying the *City of Dearborn* factors to the record as set forth in the Stipulated Facts, this Court finds that the City has sustained its burden to prove that the fees sought to be imposed are fair and reasonable. First, the contemplated use of the public rights-of-way by TCG appears to be extensive. Although TCG first submitted an application in 1998 to install less than 2500 feet of fiber optic cable and about 240 feet of underground conduit, it now appears that TCG intends to "construct and operate facilities for the provision of telecommunications services throughout the City." Stipulated Facts ¶ 54.

Second, a number of other carriers have agreed to the fee provisions proposed by the City here. Northeast Networks, Inc., Metromedia Fiber Network Services. Inc. and Brooks Fiber Communications each have franchise agreements with the City imposing a franchisefee based upon 5% of its gross revenues in the City limits. Metromedia and Brooks Fiber's franchise agreements also impose substantially identical additional fees, including a minimal annual fee ranging from $5,000 to $10,000, a requirement that they pay third party costs, and a provision requiring that they build additional conduit for the City at no charge. In addition, Brooks Fiber's agreement requires a guarantee from the its parent. *See* Stipulated Facts, Exhibits 7, 29, 30 and 39. The Court also notes that carriers in other jurisdictions have apparently agreed to pay fees based upon gross revenues. *See City of Dearborn,* 16 F.Supp.2d at 790 (upholding 4% gross revenue fee, and noting 3 other carriers who agreed to similar fees); *City of Orangeburg,* 337 S.C. 35, 522 S.E.2d 804, 808; *City of Coral Springs,* 42 F.Supp.2d at 1309; *Town of Palm Beach,* 127 F.Supp.2d at 1353, *City of Tucson,* 950 F.Supp. at 971. Moreover, as discussed below, TCG itself appears to have accepted the fee provision during negotiations. Indeed, TCG has entered into other agreements in New York State in which it has agreed

to pay a franchise fee that is calculated on the basis of gross revenue. *See* Stipulated Facts ¶ 64.

Third, the record clearly shows that negotiations were on-going and fairly constant since 1992, and resulted in extensive give-and-take by the parties, represented by knowledgeable counsel, over numerous proposed provisions.

Lastly, there is no basis to conclude that the fees sought would likely render doing business with the City unprofitable. As noted, other prospective franchisees have accepted them. On a number of occasions during negotiations, it appeared as if TCG itself would have accepted the fees requested and, at a minimum, the extensive correspondence and communications between the parties does not suggest that the level of fees proposed would have caused TCG to refuse to deal with the City.[12]

In light of these factors, the Court concludes that the City has demonstrated that the fees it seeks to impose in the August Proposal, including the guarantee provision,[13] are

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[12] For example, a TCG attorney in 1994 stated that it was her guess that TCG was willing to pay the 5% franchise fee in order to get into the business since another carrier had agreed to that amount. *See* Stipulated Facts ¶ 19. In addition, TCG twice gave the City written comments on proposed franchise agreements--once in 1994 and once in late 1998--without deleting the fee provisions. *See* Stipulated Facts ¶ ¶ 19 and 60. Moreover, a TCG executive conceded that TCG would have been willing to pay a 5% franchise fee and the other fees as late as August 1998. *See* Stipulated Facts ¶ ¶ 60 and 61. These examples reveal that TCG itself did not think such fees were likely to render business in the City unprofitable.

[13] As the underlying fees are upheld to be fair and reasonable, the Court sees no reason why a guarantee from TCG's

neither unfair nor unreasonable compensation under § 253(c) of the TCA.

3. *Is the Treatment of Bell Atlantic competitively neutral and nondiscriminatory?*

Even if the regulations required by the City are found to manage the public rights-of-way and the fees it seeks to impose are found to be "fair and reasonable," § 253(c) is not satisfied unless the City can show that the regulations and compensation sought to be imposed are done so on a "competitively neutral and nondiscriminatory basis."[14] TCG contends that Bell Atlantic's exemption from having to enter into a franchise or from having to pay a fee is non-competitive and discriminatory, and, therefore, violates § 253(c).

The City need not treat Bell Atlantic and TCG identically in order to satisfy § 253(c). *See Cablevision,* 184 F.3d at 103 ("As long as the City makes distinctions based on valid considerations, it cannot be said to have discriminated against [the entrant] in favor of [the incumbent carrier]."); *City of Dearborn,* 16 F.Supp.2d at 792 ("the

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parent--which serves only to provide the City with greater assurance that its fees are paid on a timely and reliable basis--would not be similarly upheld.

[14] At least one case has questioned whether § 253(c) imposes the requirement of competitive neutrality and nondiscrimination on the fee alone or whether it applies to both the fee and the municipality's management of the rights-of-way. *See Cablevision,* 184 F.3d at 100-02. This Court need not decide that issue here, and instead assumes *arguendo*-- as the First Circuit did in *Cablevision*--that the requirement applies to both the fee charged and the City's management of its rights-of-way.

explicit language of the statute does not require such strict equality."); *City of Dallas*, 8 F.Supp.2d at 593 ("being competitively neutral does not require cities to treat all providers identically and to ignore the significant distinctions among them.").

Indeed, Congress offered a "parity" provision that would have prohibited local governments from imposing a fee that distinguished among different providers, including the incumbent provider. 141 Cong. Rec. H8427 (Aug. 4th 1995). In opposition to this proposal, Representative Stupak stated:

> Local governments must be able to distinguish between different telecommunication providers. The way the [parity] amendment is right now, they cannot make that distinction. For example, if a company plans to run 100 miles of trenching in our streets and wire to all parts of the cities, it imposes a different burden on the right-of-way than a company that just wants to string a wire across two streets to a couple of buildings. The [parity] amendment states that local governments would have to charge the same fee to every company, regardless of how much or how little they use the right-of-way or rip up our streets.
>
> Congress promptly rejected this provision, and adopted instead the current version of § 253(c).

Here, the City presents powerful reasons why Bell Atlantic should be treated differently. For nearly one hundred years, Bell Atlantic has been installing equipment and facilities under the City's streets. Over this long period

of time, Bell Atlantic has, in fact, been paying a fee to the City, in the form of having provided the City with free use of its conduit--a valuable asset--in exchange for using the rights-of-way. Specifically, Bell Atlantic has provided additional conduit at no charge for the City to build a communications system involving the City's police and fire facilities, traffic control system, schools, libraries and other municipal buildings. Moreover, Bell Atlantic must offer universal service and affordable rates to the City's residents, while new entrants such as TCG may limit their offerings to the most profitable business centers.

Of the non-fee related provisions to which TCG objects and that have not been preempted by this Court, the focus of those remaining regulations in the Ordinance and the August Proposal seem to functionally apply only to those providers who intend to install new equipment and facilities in the rights-of- way and engage in new construction--e.g., submission of construction plans, performance bonds, indemnification for damage to property, regulations designed to minimize street disruption.

As TCG has not presented sufficient evidence showing that Bell Atlantic has newly constructed conduits or is engaged in any activity that may otherwise impact the physical rights-of-way of the City since the adoption of the Ordinance,[15] it cannot be said that exempting Bell Atlantic

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[15] There is only one mention of construction activity by Bell Atlantic in the last decade. *See* Stipulated Facts ¶ 116 ("The majority (maybe as much as 75%) of the conduit constructed by Bell Atlantic for use by the City was constructed prior to 1990. In many of the thoroughfares in the downtown area, the underground conduit predates 1990; any new conduit was probably placed in underlying areas or in short sections."). TCG has simply failed to adduce an appropriate

from those particular regulations has had a discriminatory or non-competitive effect.[16] Compare *Cablevision,* 184 F.3d at 103 ("Constructing new conduit requires digging up the City's streets and attendant disruption. Putting new cable in existing conduit or converting existing cable to new uses does not require digging up streets or disruption. Thus, it is not discrimination for the City to have different policies for the construction of conduit that is new and for the conversion of the uses to which existing conduit can be put.").

The fees that the City wishes to impose, however, are not based upon the construction of new facilities, but rather on the existence of revenue and the provision of services from networks running in the City's right-of-way. In this regard, the imposition of a disparate fee could, indeed, have a discriminatory or non-competitive effect.

Here, the City has offered evidence of what it considers to be Bell Atlantic's compensation-in-kind to the City by providing an extensive underground conduit network throughout the City, housing eleven miles of the City's cable network, free municipal use of conduit for certain governmental agencies, and universal service to all City residents. *See e.g.,* Stipulated Facts ¶ ¶ 113, 114, 116, 134-

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factual predicate on this record to show that Bell Atlantic engaged in new construction activity in the City since the adoption of the Ordinance in December 1997. Accordingly, this opinion does not address the implications of such new construction, if any.

[16] Whether Bell Atlantic itself would be required to be subject to the Ordinance, including a franchise agreement, if it decides to build more conduit or construct other telecommunications facilities in the City's rights-of-way in the future is a question beyond the scope of this particular dispute.

39. This extensive network Bell Atlantic has built clearly has been the result of a large capital expenditure by Bell Atlantic. Moreover, although the total amount has never actually been calculated, Bell Atlantic has foregone fees it could have charged the City for such municipal uses. *See* Stipulated Facts ¶ 118.

The Court finds this evidence is sufficient to sustain the City's burden that the fees charged to TCG and the fees paid by Bell Atlantic are competitively neutral and nondiscriminatory. TCG offers no proof that the fee "charged" to Bell Atlantic, as opposed to that which would be imposed on TCG, would have a noncompetitive or discriminatory effect. Simply asserting that the fees being charged were "different" or "unequal" is an insufficient demonstration that they are non-competitive or discriminatory in violation of § 253(c). *See City of Dearborn,* 16 F.Supp.2d at 792 ("Nothing in the debate of the Stupak-Barton amendment, which became § 253(c), indicates that it was intended to force local authorities to charge exactly the same fees and rates, and, in fact, it explicitly rejects that proposition."); *City of Dearborn,* 16 F.Supp.2d at 792 ("competitively neutral" and "nondiscriminatory" is not the same as being identical) (citing 141 Cong. Rec. H8427).

II. New York State Law

Plaintiffs contend that the City's actions also violate New York State law (Claims 9 through 12). The Court discusses each of the two claims separately below.

A. The New York Transportation Corporations Law

TCG contends that the August Proposal violates § 27

of the New York Transportation Corporation Law, which provides that a corporation deemed a "Telephone Corporation" under that act is authorized to place equipment in the local rights-of-way. N.Y. Trans. Corp. Law § § 2 and 25 (granting the right to "erect, construct and maintain the necessary fixtures for its lines upon, over or under any of the public roads, streets and highways."). Moreover, § 27 states that a corporation subject to it is "authorized, from time to time, to construct and lay lines of electrical conductors under ground in any city, village or town within the limits of this state."

However, that statute also requires the permission of the local government to install any such equipment: "provided that such corporation shall, before laying any such line in any city, village or town of this state, first obtain from the common council ... permission to use the streets within such city, village or town for the purposes herein set forth." § 27 of N.Y. Trans. Corp. Law.

While TCG contends that the local government's authority under § 27 is limited to giving permission as to where the facilities can be located, state courts have held that local governments may, consistent with their charters, require franchises. *See People's Cable Corp. v. City of Rochester,* 70 Misc.2d 763, 334 N.Y.S.2d 972 (N.Y.Sup.1972) (upholding--in response to challenge under § 27--the authority of a local municipality to impose a franchise fee on a cable operator); *Staminski v. Romeo,* 62 Misc.2d 1051, 1053, 310 N.Y.S.2d 169 (N.Y.Sup.1970) (noting that § 27 of the N.Y. Trans. Corp. Law requires that telegraph and telephone companies "obtain permission of the city ... authorities to use local streets for the construction of its lines," and that this requirement has resulted in "companies having to obtain local franchises when they sought to construct ... either above or below the public

highways").

As the City's charter expressly authorizes it to seek a franchise and mandates that the franchisee "be required to pay annually to the city such percentage of the gross receipts arising from the use of such franchise" as shall be fixed by the agreement as "fair compensation," § 27 of the N.Y. Transportation Corporations Law is not violated. *See* Charter of the City of White Plains § 33 (Stipulated Facts, Ex. 3). Compare *New York Telephone Company v. City of Amsterdam,* 200 A.D.2d 315, 317-18, 613 N.Y.S.2d 993 (App.Div.1994) (ruling that fee exacted in relation to excavation permit on per square foot basis was an unauthorized tax); with *Niagara Mohawk Power v. New York State Department of Transportation,* 224 A.D.2d 767, 769, 637 N.Y.S.2d 505 (App.Div.1996) (distinguishing between "permit fees ... imposed under the power to regulate" held invalid under *Amsterdam* with "fee ... for a license permitting ... entry upon respondents' lands for the purpose of erecting transmission lines [based on fair market rental value]," and ruling that the latter is permissible).

B. The New York Public Service Law

Plaintiffs assert that New York Public Service Law § § 94 and 99 limit the City's regulatory authority under the Ordinance and the franchise agreement by granting the PSC exclusive jurisdiction to regulate certain activities of telecommunications providers (Claim 10). According to plaintiffs, those aspects include, *inter alia,* the capitalization of telephone companies and their facilities, the manner in which their lines and property are leased, operated, or managed, the safety and security of lines, and the authority to inspect the property and records of the telephone carrier. *See* N.Y. Pub. Serv. Law § 94(2).

Plaintiffs argue that because TCG has obtained the necessary certificate of public convenience and necessity from the PSC, it follows that the PSC has reviewed and analyzed TCG's legal, financial and technical ability to construct and operate telephone and telecommunications facilities, and has found TCG to be qualified. Accordingly, plaintiffs claim that portions of the Ordinance and the August Proposal overlap with the PSC's jurisdiction and should be preempted.

Most of those provisions which TCG asserts are duplicative of, or are in conflict with, the PSC's jurisdiction either have been mooted by the August Proposal or dismissed by this Court. Accordingly, the Court need not address those particular sections of the Ordinance or the August Proposal.

The remaining provisions, which relate to topics such as renewal terms of the franchise, rights upon the termination of the franchise, change of control and assignment, do not, in this Court's opinion, implicate § 94 of the N.Y. Public Service Law in the manner TCG asserts. Accordingly, Claim 10 is dismissed.

III. Due Process Under the Fourteenth Amendment

TCG claims that the City has violated its due process rights under the Fourteenth Amendment by taking, without compensation, TCG's "right" under the New York Transportation Corporation Law to use the public rights-of-way (Claim 13). As discussed above, the City has not "taken" property from TCG that was granted under § 27 of the N.Y. Transportation Corporations Law, but, instead, has exercised its right to approve or deny permission as granted by that statute. The City was simply exercising its regulatory

powers in requiring TCG to agree to a franchise, and, accordingly, is not in violation of the 14th Amendment. *See New York Telephone Company v. Commissioner of New York State Department of Transportation,* 62 Misc.2d 6, 307 N.Y.S.2d 945, 949 (N.Y.Sup.1970) (finding no deprivation of property without just compensation under 14th Amendment where telephone company subject to § 27 of N.Y. Trans. Corp. was denied state franchise to install buried telephone cable); *see also New York Telephone Company v. Town of North Hempstead,* 41 N.Y.2d 691, 699- 700, 363 N.E.2d 694, 395 N.Y.S.2d 143 (1977) (noting that "[t]elephone [c]ompany's right to erect poles under section 27 of the Transportation Corporations Law has been held to be a license or privilege" and not a property interest).

Moreover, even if the City's requirement of a franchise were to have taken a valid property interest, the City's requirements would, for 14th Amendment purposes, constitute a permissible economic regulation. *See Eastern Enterprises v. Apfel,* 524 U.S. 498, 523, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) (noting that "party challenging government action as an unconstitutional taking bears a substantial burden," and that "[g]overnment regulation often curtails some potential for the use or economic exploitation of private property, ... and not every destruction or injury to property by governmental action has been held to be a taking in the constitutional sense.") (internal quotations and citations omitted). Accordingly, plaintiffs' constitutional claim under the 14th Amendment is dismissed.

CONCLUSION

For the foregoing reasons, this Court finds in favor of plaintiffs, in part, and in favor of defendant, in part. The parties are directed to settle a judgment in 14 days on 5 days notice.

SO ORDERED.

CITY OF WHITE PLAINS TELECOMMUNICATIONS FRANCHISING AND LICENSING ORDINANCE[1]
(adopted Dec. 1, 1997)

Article 1

DEFINITIONS

Sec. 1-1. *Definitions*

For purposes of this chapter, the following terms, phrases, words and their derivations shall have the meanings set forth in this section, unless the context clearly indicates that another meaning is intended. When not inconsistent with the context, words used in the present tense include the future, words used in the plural number include the singular number and words used in the singular number include the plural number.

1-1-01. "*Affiliated person*" means each person who falls into one (1) or more of the following categories: (i) each person having, directly or indirectly, a controlling interest in the applicant; (ii) each person in which the applicant has, directly or indirectly, a controlling interest; (iii) each officer, director, joint venturer or joint venture partner, of the applicant; and (iv) each person, directly or indirectly, controlling, controlled by, or under common control with, the applicant; provided that "affiliated person" shall in no event mean the city or any creditor of the applicant solely by virtue of its status as a creditor and which is not otherwise an affiliated person by reason of owning a controlling interest in, being owned by, or being under common ownership, common management or common control with, the applicant.

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[1] Codified as Ch. 23, title 4 of the Code of City of White Plains.

1-1-02 *"Cable services"* means "cable services" as defined in the Communications Act of 1934, as amended by the Cable Communications Policy Act of 1984, the Cable Television Consumer Protection and Competition Act of 1992, and the Telecommunications Act of 1996 and as may be further amended from time to time (the "Cable Act"). In the event that "cable services" is no longer defined in the Cable Act or the definition of Cable Act otherwise becomes inapplicable, "cable services" shall mean "cable services" as defined in the Cable Act immediately prior to such term no longer being defined in the Cable Act or such definition otherwise becoming inapplicable.

1-1-03 *"City"* means the City of White Plains, New York.

1-1-04 *"Common council"* means the common council of the city and its designee or any successor thereto.

1-1-05 *"Control"* or *"controlling interest"* means actual working control in whatever manner exercised, including, without limitation, working control through ownership, management, debt instruments or negative control, as the case may be, of the applicant or the equipment in the streets. A rebuttable presumption of the existence of control or a controlling interest shall arise from the beneficial ownership, directly or indirectly, by any person, or group of persons acting in concert, of more than ten (10) percent of any person (which person or group of persons is hereinafter referred to as "controlling person"). "Control" or "controlling interest" as used herein may be held simultaneously by more than one (1) person or group of persons.

1-1-06 *"Equipment"* means the poles, wires, electrical conductors, conduits, subways, manholes, fixtures, appliances and appurtenances that are used to provide telecommunications services.

1-1-07 *"Franchise"* means an initial authorization, or

renewal thereof, issued by the city in accordance with the provisions of this chapter which authorizes the occupation and use of the streets to provide telecommunications services.

1-1-08 *"May"* is permissive.

1-1-09 *"Mayor"* means the mayor of the city or his/her designee.

1-1-10 *"Ordinance"* means this chapter and all modifications and amendments thereto.

1-1-11 *"Person"* means any individual or any association, firm, partnership, joint venture, corporation or other legally recognized entity, whether for profit or not for profit, but shall not mean the city or the city school district of the City of White Plains.

1-1-12 *"Revocable license"* means an initial authorization or renewal thereof, issued by the city in accordance with the provisions of this chapter, which authorizes the limited occupation and use of specifically identified streets, provided that a revocable license shall be issued only in the limited circumstances set forth in section 4-23-2(b) and (g) of this chapter.

1-1-13 *"Shall"* is mandatory, not merely directive.

1-1-14 *"Streets"* means the surface of, as well as the spaces above and below, any and all streets, alleyways, avenues, highways, boulevards, driveways, bridges, tunnels, parks, parkways, public grounds or waters, and other public rights-of-way within or belonging to the city.

1-1-15 *"Telecommunications"* means all transmissions, between or among points specified by the user, of information of the user's choosing without change in the

form or content of the information as sent and received.

1-1-16 *"Telecommunications provider"* means any person who:

(1) Owns, constructs, operates or maintains equipment in the streets used to provide telecommunications services regardless of whether such telecommunications services originate or terminate in the city; or

(2) Provides telecommunications services that originate or terminate in the city by means of: (i) specifically identifiable equipment in the streets, which equipment is owned by such person or made available to such person under a lease or any other arrangement for a period longer than one hundred twenty (120) days; or (ii) equipment in the streets if the use of such equipment is continuing and substantial, and the city has determined that it is necessary and appropriate to impose the requirements of this chapter in order to preserve the application of this chapter on a competitively neutral and nondiscriminatory basis consistent with applicable law.

1-1-17 *"Telecommunications services"* means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used. The term "telecommunications services" shall not include cable services.

1-1-18 *"Telecommunications system"* means the plant, equipment, real property (including interests in real property), tangible and intangible personal property, buildings, offices, furniture, customer lists, cable, wires, optical fibers, amplifier, antenna, and all other electronic devices, equipment and facilities used to provide telecommunications services.

Article 2

GRANTING AUTHORITY AND FRANCHISING PROCEDURE

Sec. 2-1. ***Granting authority***

2-1-01 No person shall use or occupy the streets as a telecommunications provider, or construct, operate or maintain equipment in the streets used to provide telecommunications, without a franchise or revocable license granted by the city. A franchise or revocable license granted in accordance with the provisions of this chapter shall not be construed to grant any rights or authorization to provide cable services in the city, and any person seeking to provide cable services in the city shall first obtain a separate franchise in accordance with applicable law.

2-1-02 Any person seeking to use the streets to construct, operate or maintain equipment to provide telecommunications for or in connection with the internal operations of such person's business, residence or employment and not for or in connection with the provision or offering of telecommunications services for sale or resale to any person in the city, shall first obtain a revocable license in accordance with the provisions of this chapter.

2-1-03 The common council may grant one (1) or more franchises and revocable licenses in accordance with this chapter, provided that the common council reserves the right to modify any provision of this chapter by amendment hereof.

2-1-04 The grant of any franchise or revocable license shall be made by adoption of a separate ordinance by the common council and shall be on such terms and conditions as shall be specified in said separate ordinance and/or a franchise or license agreement between the city and the franchisee or

licensee.

2-1-05 Any franchise or revocable license granted shall be nonexclusive. The city specifically reserves the right to grant, at any time, such additional franchises, revocable licenses or other authorizations for use of the streets by any means, as the city deems appropriate.

2-1-06 A franchise may be granted for all or any defined portion of the city.

2-1-07 A revocable license is intended to be a limited grant of authority to use and occupy specifically identified streets to provide telecommunications services and shall be granted only if:

(a) The use or occupation of such streets, together with all revocable licenses previously granted to such person and affiliated persons, shall not exceed two thousand five hundred (2,500) linear feet; or

(b) The use or occupation of such streets does not involve the offering or provision of telecommunications services to any person within the city.

In the event an application for a revocable license would cause a telecommunications provider to exceed or fail to comply with the limits specified in subsection (1) or (2) above, then such telecommunications provider must apply for a franchise in accordance with the provisions of this chapter and the use of specifically identified streets pursuant to all previously granted revocable licenses shall thereafter be pursuant to and in accordance with any such franchise that may be granted.

Sec. 2-2. ***Compliance with rules; permits required***

2-2-01 Subject to the provisions of this chapter, the city may adopt rules, policies and requirements to carry out the purposes and provisions of this chapter. Each applicant, franchisee and licensee shall comply with such rules, policies and requirements.

2-2-02 No person shall construct or install any equipment in the streets used to provide telecommunications services without first obtaining such permits or other authorizations as may be required by the city. No permits or other authorizations for such construction or installation shall be issued prior to the granting of a franchise or a revocable license pursuant to this chapter or such other authorization as may be required by applicable law.

Sec. 2-3. ***Submission of application***

2-3-01 Applications for franchises and revocable licenses shall be submitted to the commissioner of public works with a copy also to be submitted to the corporation counsel.

2-3-02 An application shall contain the following information with respect to the proposed franchise or revocable license and such other information with respect to the proposed franchise or revocable license as the city may deem necessary or appropriate, consistent with applicable law:

(i) The name, address and telephone number of the applicant and the person the city may contact concerning the application;

(ii) A description of the telecommunications services proposed to be provided, including, without limitation, a description of facilities and equipment;

(iii) A description of the proposed franchise area or in the case of a revocable license, the specifically identified streets and/or portions thereof proposed to be used;

(iv) A proposed construction schedule and sequence;

(v) A map showing the proposed location of the applicant's telecommunications system;

(vi) Proposed financing plans for the construction and operation of the telecommunications system by which the proposed telecommunications services would be provided;

(vii) A description of the legal, financial, technical and other appropriate qualifications of the applicant to hold the franchise or revocable license;

(viii) Ownership of the applicant and identification of all affiliated persons.

Sec. 2-4. ***Responsibilities of applicants***

It shall be the responsibility of each applicant for a franchise or revocable license to comply with all applicable laws, ordinances, resolutions, rules, regulations and other directives of the city and any federal, state or local governmental authority having jurisdiction.

Sec. 2-5. [Reserved for future use]

Sec. 2-6. ***Negotiation of agreement***

If an application is complete and otherwise complies with applicable law, ordinances, resolutions, rules, regulations

and other directives of the city, including the provisions of this chapter, the city shall enter into negotiations with the applicant to determine whether such applicant and the city are able to reach agreement on the terms of the proposed franchise or revocable license in accordance with sections 4-23-10 and 4-23-11 of this chapter. The city may reject any application which is incomplete or otherwise fails to comply with applicable law, ordinances, resolutions, rules, regulations and other directives of the city and any federal, state or local authority having jurisdiction.

Sec. 2-7. ***Factors for review of application***

2-7-01 In making any determination hereunder as to any application for a franchise or revocable license, the common council may consider such factors as it deems appropriate and in the public interest, provided such factors are consistent with applicable law, including without limitation:

(i) The adequacy of the proposed compensation to be paid to the city, including the value of any facilities and telecommunications services offered by the applicant to the city;

(ii) The legal, financial, technical and other appropriate qualifications of the applicant;

(iii) The ability of the applicant to maintain the property of the city in good condition throughout the term of the franchise or the revocable license;

(iv) Any services or uses of the streets that may be precluded by the grant of the franchise or revocable license; and the adverse impact of the proposed franchise or revocable license on the efficient use of the streets or utilities at present and in the future;

(v) The willingness and ability of the applicant to meet construction and physical requirements and to abide by all lawful conditions, limitations, requirements and policies with respect to the franchise or the revocable license;

(vi) The adequacy of the terms and conditions of the proposed franchise or revocable license agreement to protect the public interest, consistent with applicable law; and

(vii) Any other public interest factors or considerations that the city has a lawful right to consider and that are deemed pertinent by the city for safeguarding the interests of the city and the public.

2-7-02 Consistent with applicable law, the city may develop and implement policies and requirements to ensure that the streets have sufficient capacity reasonably to accommodate existing and future uses in a rational and efficient manner. In evaluating an applicant for a franchise or revocable license, the city may consider an applicant's proposals for addressing capacity needs and compliance with city policies and requirements.

Sec. 2-8. ***Procedure for consideration of and action on applications***

2-8-01 The common council may make such investigations and take or authorize the taking of such other steps as the common council deems necessary or appropriate to consider and act on applications for franchises and revocable licenses and to determine whether a franchise or revocable license should be granted to an applicant, and may require the applicant to furnish additional information and data for this purpose. In considering applications, the common council may seek advice from city officials, departments, agencies, boards, commissions or boards, from such other advisory

bodies as it may establish or determine appropriate, or from the public, and may request the preparation of one (1) or more reports to be submitted to the common council, which may include recommendations with respect to such applications.

2-8-02 Consist with applicable law, upon completion of the steps deemed appropriate by the common council, the common council may grant or deny the franchise or revocable license, and may specify the conditions under which the franchise or revocable license is granted.

Sec. 2-9. ***Terms and conditions of franchise***

2-9-01 The terms and conditions applicable to any franchise granted pursuant to this chapter shall be set forth in the separate ordinance granting the franchise and/or in a separate written agreement. A franchise granted pursuant to this chapter shall not become effective until said separate ordinance becomes effective and any separate agreement is executed by both parties. Such separate ordinance or written agreement, among other things, shall address the following subjects:

(i) The term of the franchise;

(ii) The franchise area and the telecommunications services to be offered;

(iii) The compensation to be paid to the city, which shall include the payment of fees and/or the provision of facilities or services;

(iv) The circumstances upon which the franchise may be terminated or cancelled;

(v) The mechanisms, such as performance bonds, security

funds or letters of credit, to be put in place to ensure the performance of the franchisee's obligations under the franchise;

(vi) The city's right to inspect the facilities and records of the franchisee;

(vii) Insurance and indemnification requirements applicable to the franchisee;

(viii) The obligation of the franchisee to maintain complete and accurate books of account and records, and the city's inspection rights with respect thereto;

(ix) Provisions to ensure quality workmanship and construction methods;

(x) Provisions to ensure that the franchisee will comply with all applicable city, state and federal laws, regulations, rules and policies;

(xi) The obligation of the franchisee to supply an engineering site plan showing the proposed location of the applicant's telecommunications system, including any manholes or overhead poles, the size, type and proposed depth of any conduit or other enclosure, and the relationship of the system to all existing poles, utilities, sidewalks, pavement, telecommunications systems, and other improvements in the streets, all of which shall be subject to approval by the appropriate city departments;

(xii) Provisions to restrict the assignment or other transfer of the franchise without the prior written consent of the city;

(xiii) Remedies available to the city to protect the city's interest in the event of the franchisee's failure to comply with terms and conditions of the franchise;

(xiv) Provisions to ensure that the franchise will obtain all

necessary licenses and permits from, and comply with, all laws, regulations, rules and policies of any governmental body having jurisdiction over the franchisee, including the Federal Communications Commission;

(xv) Provisions to ensure that the franchisee will protect the property of the city and the delivery of public services from damage or interruption of operations resulting from the construction, operation, maintenance, repair or removal of improvements related to the franchise;

(xvi) Provisions designed to minimize the extent to which the public use of the streets of the city are disrupted in connection with the construction of improvements relating to the franchise; and

(xvii) Such other provisions as the city determines are necessary or appropriate in furtherance of the public interest, consistent with applicable law.

Sec. 2-10. ***Terms and conditions of revocable license***

2-10-1 The terms and conditions applicable to any revocable license granted pursuant to this chapter shall be set forth in the separate ordinance granting the revocable license and/or in a separate written agreement. A revocable license granted pursuant to this chapter shall not become effective until the separate ordinance granting the license becomes effective and any separate written agreement is executed by both parties. Such separate ordinance and/or written agreement shall address the same subjects listed in section 4-23-10 of this chapter subject to the following limitations:

(i) The revocable license shall be for a term not to exceed ten (10) years from the date that the ordinance granting the revocable license becomes effective;

(ii) The revocable license shall be revocable at any time by the city for cause or for the city's purposes; and

(iii) The revocable license, together with all revocable licenses previously granted to the applicant or affiliated persons, shall not authorize the occupation and use of more than two thousand five hundred (2,500) linear feet of specifically identified streets, unless the use or occupation of the streets does not involve the offering or provision of telecommunications services to any person in the city.

In the event an application for a revocable license would cause a telecommunications provider to exceed or fail to comply with the limits specified in section 4-23-11(3) of this chapter, then such telecommunications provider must apply for a franchise in accordance with the provisions of this chapter and the use of specifically identified streets pursuant to all previously granted revocable licenses shall thereafter be pursuant to and in accordance with any such franchise that may be granted.

Article 3

GENERAL PROVISIONS

Sec. 3.1 *Severability*

If any section, subsection, sentence, clause, phrase or other portion of this Ordinance is, for any reason, declared invalid, in whole or in part, by any court, agency, commission, legislative body or other authority of competent jurisdiction, such portion shall be deemed a separate, distinct and independent portion. Such declaration shall not affect the validity of the remaining portions hereof, which other portions shall continue in full force and effect.

Sec. 3.2 *Delegation*

The Common Council shall have the right to delegate and

redelegate, and to revoke any such delegation or redelegation, from time to time, any of its rights or obligations under this Ordinance to any body, organization or official of the City. Any such delegation, redelegation or revocation, no matter how often made, shall not be deemed an amendment to this Ordinance or to require the consent of any applicant for a Franchise or Revocable License or franchisee or license.

POST-ARGUMENT QUESTIONS ADDRESSED BY THE SECOND CIRCUIT TO THE FCC (JANUARY 29, 2002)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK, NEW YORK 10007
(212) 857-8500 TELEPHONE
(212) 857-8710 FACSIMILE

JOHN M. WALKER, JR.
CHIEF JUDGE

ROSEANN B. MACKECHNIE
CLERK OF COURT

January 29, 2002

Rodger D. Citron, Esq.
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: *TCG New York, Inc., et al. v. City of White Plains*, 01-7213 Date of Argument: December 3, 2002

Dear Mr. Citron:

The court requests that the Federal Communications Commission offer its views on the following issues at they pertain to the case under review:

(1) Under 47 U.S.C. § 253(d), does the Commission have exclusive, concurrent (with a United States District Court), or no jurisdiction to enforce against a local government the provisions of 47 U.S.C. § 253(a)?

(2) Whenever the Commission enforces section 253(a) against a local government, does it have jurisdiction to adjudicate the local government's section 253(c) defense to a section 253(a) violation?

(3) (a) In the pending case, is the City's imposition of a five percent annual franchise fee, based on gross revenue, "fair and reasonable compensation" for "use of public rights-of-way" within the meaning of section 253(c), wholly apart from whether the fee is "competitively neutral and nondiscriminatory?" (b) if not, is "fair and reasonable compensation" limited to a local government's reimbursement for its costs? (c) If "fair and reasonable compensation" is not limited to a local government's reimbursement for its costs, what criteria are to be used to determine whether a local government's charge is "fair and reasonable compensation?"

The maximum length of the brief shall be 20 double-spaced pages. Counsel for the FCC should submit its brief no later than February 25, 2002.

I have enclosed copies of the briefs that were filed in this case.

Thank you.

Very truly yours,

/s Roseann B. MacKechnie

EXCERPTS FROM THE CITY'S AUGUST 1999 PROPOSED FRANCHISE AGREEMENT

2. FRANCHISE GENERAL CONDITIONS

* * *

2.7 Educational and Governmental Rates. During the term of this Agreement, **THE COMPANY** shall always treat the **CITY** and elementary and secondary educational institutions in the **CITY** as "most favored vendees". To that end, if the **CITY** or the elementary or secondary educational institutions in the **CITY** shall desire to contract for the purchase, lease or other use of any Services, facilities or equipment provided by **THE COMPANY** or any Affiliated Party, **THE COMPANY** shall, subject to applicable law, offer the **CITY** and the elementary and secondary educational institutions in the **CITY** contract terms and conditions no less favorable than the most advantageous terms and conditions offered any of **THE COMPANY**'s governmental agencies and non-profit organizations for similar or identical transactions within Westchester County. The **CITY** and **THE COMPANY** agree that any capital expenditures, costs or expenses incurred in connection with connecting to **THE COMPANY**'s cost to the **CITY** and/or elementary and secondary educational institution provided that **THE COMPANY** shall document its costs and figures therefor.

3. REPRESENTATIONS, WARRANTIES AND COVENANTS

3.1 Representations by **THE COMPANY**. **THE COMPANY** makes the following representations, warranties and covenants as the basis for the benefits and obligations contained in this Agreement:

* * *

(4) **THE COMPANY** represents and warrants that it is not prohibited from entering into this Agreement and discharging and performing all covenants and obligations on its part to be performed under and pursuant to this Agreement; that the execution and delivery of this Agreement, the consummation of the transactions contemplated hereby, and the fulfillment of and compliance with the provisions of this Agreement will not conflict with, or constitute a breach of or a default under, any of the terms, conditions, or provisions of any law, any order of any court or other agency of government having jurisdiction, or any contractual limitation, or outstanding trust indenture, deed of trust, mortgage, loan agreement, other evidence of indebtedness or any other agreement or instrument to which **THE COMPANY** or any Affiliated Person is a party or by which it or any of its property is bound, or result in a breach of or a default under any of the foregoing; and that this Agreement is the legal, valid and binding obligation of **THE COMPANY** enforceable in accordance with its terms, except as it may be rendered unenforceable by reason of bankruptcy or other similar laws affecting creditors' rights and the applicability of provisional or equitable remedies.

* * *

8. COMPENSATION TO THE CITY

8.1 (a) Franchise Fee. As compensation for the rights and privileges granted by this franchise, **THE COMPANY** shall pay to the **CITY** an annual fee equal to five (5%) percent of Gross Revenues. The payments of the aforesaid fees shall in no way be construed to include the payment of real estate taxes to the **CITY** nor shall such

franchise fee constitute a deduction from Gross Revenues for the purposes of computing the amount of franchise fee due.

8.1(b) Minimum Annual Fee. Notwithstanding the fee calculation method set forth in Section 8.1(a) above, **THE COMPANY** shall pay to the **CITY** a minimum annual Franchise Fee unless the calculation required by Section 8.1(a) hereinabove results in a payment greater than the Minimum Annual Fee set forth herein. Such fee shall be Five Thousand Dollars ($5,000.00) for the year 1999 and shall increase by ten (10%) percent per year until it reaches Eight Thousand Dollars ($8,000.00) in the sixth (6th) year (2004). The minimum annual fee shall remain at Eight Thousand Dollars ($8,000.00) per year until the fifteenth (15th) year, when upon renewal of the franchise term under the terms and conditions set forth herein, said annual minimum fee shall increase to Ten Thousand Dollars ($10,000.00) per year for each year thereafter for the duration of the renewal term of this Agreement.

8.1(c) Franchising and Other Costs. **THE COMPANY** has, prior to the execution of this Agreement, paid a portion of the costs, if any, the **CITY** incurred for the services of third parties (including, without limitation attorneys and other consultants) in connection with the award of this Franchise. Within thirty (30) days after receipt from the **CITY** of an invoice, **THE COMPANY** shall pay to the **CITY** or, at the direction of the **CITY**, to a third party, the remaining costs, if any, the **CITY** incurred for the services of third parties (including, without limitation, attorneys and other consultants) in connection with the award of this Franchise. **THE COMPANY** shall pay at such time and in such manner as the **CITY** shall specify to the **CITY** or, at the direction of the **CITY**, to third parties an amount equal to the costs the **CITY** incurs for the services of third parties (including but not limited to attorneys and other

consultants) in connection with any renewal, renegotiation, transfer, amendment or other modification of this Agreement or the Franchise.

8.1(d) No Credits or Deductions. No Credits or Deductions. The compensation and other payments to be made pursuant to this Section 8 shall not be deemed to be in the nature of a tax and shall not be deducted from Gross Revenue, and shall be in addition to any and all taxes or other fees or charges that **THE COMPANY** shall be required to pay to the **CITY** or to any state or federal agency or authority, all of which shall be separate and distinct obligations of **THE COMPANY**. **THE COMPANY** shall comply with the applicable provisions of Section 600 of the New York State Real Property Tax Law, and agrees to waive the tax credits available under Section 626 of the Real Property Tax Law.

8.2 As additional compensation to the **CITY** for use of the Streets, and to minimize disruption caused by repeated construction in the Streets and promote efficient management and use of the Streets, **THE COMPANY** at its own cost and expense shall install one thousand feet of conduit for the **CITY** at points where its Fiber Optic Network overlaps the **CITY**'s fiber optic system currently under construction. In addition, **THE COMPANY** agrees to install additional conduit for municipal purposes along its Fiber Optic Network for which the **CITY** will reimburse **THE COMPANY** for the cost of materials. "Municipal purposes" shall mean only those purposes that are governmental in nature. In no event shall the **CITY** use any conduit installed by **THE COMPANY** for the **CITY**'s use for any purpose that shall be commercial in nature or that shall result in the **CITY** providing conduit capacity or services in competition with **THE COMPANY**.

Notwithstanding anything herein to the contrary, **THE COMPANY**'s conduit installation obligations for the benefit of the **CITY** in this Section 8.2 shall be applicable only in the event that the **THE COMPANY** shall engage in new construction to install conduit for **THE COMPANY**'s own use pursuant to this Agreement. "New construction" shall mean that **THE COMPANY** shall excavate or dig in the streets to install its conduit under the Streets.]

8.3 Payments. Once the Fiber Optic Network is operational, the amount of the payments of the franchise fees due and payable only by **THE COMPANY** shall be computed bi-annually for the preceding six (6) months as of March 1 and September 1, of each calendar year, and such payment amount shall be due and payable to the **CITY** no later than thirty (30) days after the 1st day of Mach and the 1st day of September of each year. In the event the first year of any year of operation is less than twelve (12) calendar months, the Franchise Fees shall still be payable on March 1st and/or September 1st of that year. **THE COMPANY** shall submit bi-annual reports certified by an officer of **THE COMPANY** in conjunction with each payment setting forth the basis for computation of such payment.

8.4 Documentation. Each payment shall be accompanied by a bi-annual report certified by an officer of **THE COMPANY** showing the basis for the computation and such other relevant facts as the **CITY** may require. A bi-annual report certified by an officer of **THE COMPANY** documenting franchise fee payments or other compensatory payments shall be submitted to the **CITY**. All such documents shall be considered to constitute trade secrets and shall be treated in accordance with such classification.

8.5 Examination. Upon reasonable written notice by a duly authorized official of the **CITY** to **THE**

COMPANY, the **CITY** or its representatives shall have the right to examine any officer of, and audit documents of, **THE COMPANY** or **THE COMPANY**'s parent or an Affiliated Party as to the correctness, completeness or accuracy of any record or report with respect to the payment of franchise fees to the City.

8.6 Conditions of Acceptance. No acceptance of any payment shall be construed as an accord that the payment is in fact the correct amount, nor shall such acceptance of payment be construed as a release of any claim the **CITY** may have for further or additional sums payable under the provisions of this franchise. It is the understanding of the parties hereto that this Agreement shall not cause the **CITY** to expend any monies hereunder. **THE COMPANY** shall have no right to offset, or otherwise receive credit for, the franchise fees **THE COMPANY** shall be obligated to make to the **CITY**, including, without limitations, real estate taxes.

* * *

11. CONSTRUCTION

* * *

11.9 Fiber Optic Network Locations. To minimize disruption and inconvenience to the public, and to promote efficient use of the Streets, the Fiber Optic Network shall, to the extent feasible, be constructed in the Streets in accordance with this Agreement and applicable law. If the Fiber Optic Network is installed on private property, **THE COMPANY** shall secure the permission of the owner thereof.

* * *

d. Notwithstanding the foregoing or anything else in this Agreement, **THE COMPANY** must obtain the approval of the **CITY** regarding the location of any and all parts of the Fiber Optic Network prior to construction.

12. RECORDS AND REPORTS

12.1 Maintenance and Inspection of Records. **THE COMPANY** shall, at all times, maintain complete and accurate books of account and records of its business and operations and all other records required by this franchise. Upon no less than three (3) business days' notice, **THE COMPANY** shall allow the **CITY** to inspect and/or audit accounting and financial records of **THE COMPANY** or any Affiliated Person with respect to the Fiber Optic Network, its construction, operation and maintenance, and **THE COMPANY**'s obligations pursuant to this Agreement. Any audit by the **CITY** hereunder shall be at its expense unless such audit shall disclose an underpayment of more than three (3%) percent of the total franchise fees payable during the period of the audit, in which event **THE COMPANY** shall reimburse the **CITY** for the expense of such audit. If, as a result of such an audit, an underpayment is discovered in an amount greater than three (3%) percent of the franchise fee due for any given period, there shall be a penalty imposed equal to one and one half (1½%) percent of the underpaid amount, compounded monthly, until such amount is paid in full.

12.2 Location of Records. Insofar as practicable, the records set forth above shall be maintained at **THE COMPANY**'s office located at _____, or such other address as **THE COMPANY** may designate. Any records

not maintained there shall be made available to the **CITY** at such local business office upon request affording reasonable notice therefore.

12.3 Location of Facilities. A mapped description of the major physical elements of the Fiber Optic Network shall be submitted to the **CITY**, and a revised and corrected version thereof shall be submitted on or before December 31 of each year. All locations are to be approved by the Commissioner of Public Works and the Commissioner of Traffic of the **CITY**.

13. MISCELLANEOUS

* * *

13.6 Acceptance and Acknowledgement. **THE COMPANY** acknowledges that it has carefully read, understands and accepts without reservation the obligations imposed by the terms and conditions herein. **THE COMPANY** further agrees that as of the effective date of this Agreement, the terms and conditions of this Agreement are lawful, valid and enforceable under applicable law, and that **THE COMPANY** will not, at any time in any forum, seek or void or challenge, under applicable law as in effect on the effective date of this Agreement, any terms or conditions contained herein or the processes or procedures pursuant to which this Agreement was entered. Nothing contained herein is to be construed so as to prevent **THE COMPANY** from contesting any determination of the **CITY** in connection with this Agreement. All lawsuits commenced by the parties shall be in courts located in Westchester County or before the Federal Communications Commission in the event the Federal Communications Commission shall have jurisdiction over the disputed issue.

14. CHANGE OF CONTROL, ASSIGNMENT, ETC.

14.1 Assignments, Etc. Neither the franchise, nor any rights or obligations of **THE COMPANY** in the Equipment of the Fiber Optic Network or pursuant to this Agreement, nor any part of the capacity of the Equipment or the Fiber Optic Network, shall be encumbered, assigned, sold, transferred, pledged, leased, sublet or mortgaged in any manner, in whole or in part, to any Person, nor shall title therein, either legal or equitable, or any right or interest therein, pass to or vest in any Person, either by act or **THE COMPANY** or any Affiliated Person, by act of any Person holding Control of or any interest in **THE COMPANY**, Equipment or franchise, by operation of law, or otherwise, without the prior written consent of the **CITY**, provided that the **CITY** shall consider any such action in accordance with the usual procedural rules and the procedures set forth in Section 14.3.

No change in Control of **THE COMPANY** or the franchise shall occur after the Effective Date, without the prior written consent of the **CITY** granted pursuant to the procedures set forth in Section 14.3. The requirements of this Section 14.1 shall also apply whenever any change is proposed of twenty percent (20%) or more of the ownership or Control of **THE COMPANY**, the franchise or any Person holding control of **THE COMPANY** or the franchise. In the event that twenty percent (20%) or more of the ownership of **THE COMPANY** or the Franchise or any Person holding Control of **THE COMPANY** or the Franchise is transferred by the acquisition of publicly traded stock by a Person or Persons acting in concert without that Person or Persons having any agreement, arrangement or understanding for the purpose of acquiring, holding, voting or disposing of such stock with **THE COMPANY**, any Affiliated Person or any Person holding Control of **THE COMPANY** or any

Affiliated Person, then **THE COMPANY** shall be required to apply to the Common Council within 30 days of the date **THE COMPANY** becomes aware that such a transfer has occurred for consent to the transfer of ownership. Nothing herein shall be construed as suggesting that a proposed change of less than twenty percent (20%) does not require consent of the **CITY** (acting pursuant to the procedures set forth in Section14.3 if it would in fact result in a change in Control of **THE COMPANY** or the franchise), and any other event that could result in a change in ownership or Control of **THE COMPANY**, regardless of the manner in which such ownership or Control is evidence (e.g. stock, bonds, debt instruments or other indicia of ownership or Control).

14.2 Transfer Prior to Completion. In the event that prior to the date that the Fiber Optic Network is operational, **THE COMPANY** wishes to transfer a Controlling Interest in **THE COMPANY** to a person or entity for the sole purpose of financing the construction and associated expenses of the Fiber Optic Network, then the **CITY** may require: (i) **THE COMPANY** to demonstrate to the **CITY** that the sole purpose of the transfer is for financing the construction and associated expenses of the Fiber Optic Network; (ii) **THE COMPANY** to comply with the procedure set forth in Section 14.3 and to certify that it is not in default under this Agreement; and (iii) the person or entity acquiring the Controlling Interest in **THE COMPANY** to execute a guarantee of completion in favor of the **CITY**, which guarantees by the date stated in the guarantee of completion that the Fiber Optic Network will be operational, or said person or entity shall pay the **CITY** Fifty Thousand Dollars ($50,000.00) as liquidated damages.

14.3 Transfer Procedure. Provided **THE COMPANY** is not in default under this Agreement and there

are no outstanding violations of the Agreement and **THE COMPANY** wishes to transfer, sell or assign pursuant to Section 14.1 herein, then **THE COMPANY** shall give **CITY** a notice of intent or may petition or request the Common Council to determine that no change of control has occurred and no consent of the Common Council is required for the proposed transfer or approval of the change in ownership by publicly traded stock acquired without any agreement with **THE COMPANY** or the ownership or Control of **THE COMPANY**. **THE COMPANY**'s notice or petition shall be accompanied by all of the following, which are applicable:

(a) A copy of the proposed agreements between **THE COMPANY** and the proposed transferee or assignee;

(b) an agreement from the proposed transferee or assignee assuming the provisions of this Agreement;

(c) a statement setting forth in reasonable detail the identify of the proposed assignee or transferee and the nature of its business; and

(d) current financial information with respect to the proposed assignee or transferee to demonstrate that the proposed assignee or transferee has the financial resources necessary to perform the obligations of **THE COMPANY** under this Agreement.

(e) a petition describing the proposed action and **THE COMPANY**'s argument as to why the action would not involve a change in Control of **THE COMPANY**. **THE COMPANY** shall provide the **CITY** with: (i) additional information or documents reasonably

requested by the **CITY** and related to the obligations of this Agreement and/or the **CITY**'s authority to manage the Streets and require fair and reasonable compensation, consistent with applicable law; and (ii) an opportunity to meet and interview the proposed assignee or transferee and (iii) if **THE COMPANY** has petitioned the **CITY** for a determination an action would not be a change in Control of **THE COMPANY**, **THE COMPANY** shall submit the documents required under this Agreement for approval of a change in Control of **THE COMPANY**.

In the event that **THE COMPANY** complied with the foregoing, the **CITY** shall not unreasonably withhold its consent so long as:

(i) **THE COMPANY** shall have paid the **CITY** any reasonable costs incurred by the **CITY** to review the requested consent, including, without limitation, attorney's fees;

(ii) the proposed assignee or transferee is a reputable entity and the **CITY** has been furnished with reasonable proof thereof;

(iii) the proposed assignee or transferee is of sound financial condition as reasonably determined by the **CITY** given the obligations to be assumed by the proposed assignee or transferee;

(iv) the proposed assignee or transferee agrees to enter into an agreement approved by the **CITY**, which assumes the obligations under this Agreement; and

(v) each other Person involved in any action described in Section 14.1 agrees to enter into an

agreement containing such conditions as may be reasonably specified by the **CITY**.

* * *

16. **GUARANTY.**

16. Guaranties. This agreement is subject to the **CITY** being provided an executed guaranty by **TELEPORT COMMUNICATIONS GROUP, INC.** of the obligations of **THE COMPANY**, its wholly-owned subsidiary, hereunder in a form satisfactory to the Corporation Counsel of the **CITY** which guaranty must remain in effect during the entire term of this Agreement and the **CITY** being provided a secondary guaranty by **AT&T CORP.** of the obligations of **THE COMPANY** and **TELEPORT COMMUNICATIONS GROUP, INC.** its wholly owned subsidiaries, hereunder in a form satisfactory to the Corporation Counsel of the **CITY** which secondary guaranty must remain in effect during the entire term of this Agreement.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

December 2, 2002

Mr. William Malone
Miller & Van Eaton, #1000
1155 Connecticut Avenue, N.W.
Washington, DC 20036-4306

Re: City of White Plains, New York
v. TCG New York, Inc., et al.
Application No. 02A452

Dear Mr. Malone:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on December 2, 2002, extended the time to and including January 10, 2003.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk
By
/s
Jeffrey D. Atkins
Assistant Clerk

1e

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

NOTIFICATION LIST

Mr. William Malone
Miller & Van Eaton, #1000
1155 Connecticut Avenue, N.W.
Washington, DC 20036-5406

Mr. Stephen B. Kinnaird
Sidley Austin Brown & Wood
1501 K Street, N.W.
Washington, DC 20005

Mr. Robert G. Scott Jr.
Cole, Raywid & Braverman
1919 Pennsylvania Avenue, N.W.
Washington, DC 20006

Clerk
United States Court of Appeals for
the Second Circuit
1702 US Courthouse, Foley Sq.
New York, NY 10007